

Globalization and the (Foreign Affairs)
Constitution

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This article asserts the consequentiality of global context for the development of constitutional law, past and future. The article offers an account of the differential doctrines of foreign relations law in which they are contingent on the historical architecture of international relations, and explains why these doctrines may no longer be sustainable against the increased institutionalization of interstate relations, the disaggregation of the nation-state, and heightened international economic competition. Insofar as these elements of globalization lower the risk of catastrophic interstate conflict and take account of actors outside of the traditional diplomatic apparatus, differential foreign relations doctrines departing from baseline norms of judicial review, federalism, and individual rights are appropriately contested. These doctrines, the article argues, were once dictated by a hostile, unstable international system and the threats that it posed to the nation; all should be reexamined in globalization's wake, the events of September 11 notwithstanding. In this respect, the article parts ways with other voices in current foreign relations law debates that deploy standard, domestically-oriented metrics of constitutional discourse. The article also sketches, though only suggestively, the possibility that global context may come to determine constitutional norms beyond the traditional foreign relations law canon.

I. INTRODUCTION

We may be witnessing an architectural change in the international system. Only fifteen years ago the world was divided into two camps, staring each other down with menacing arsenals. Nation-states and their foreign ministries dominated the conduct of diplomacy, which itself centered on centuries-old issues of interstate competition and hostility. It was a world in which Metternich would have been comfortable, a world of chessboard moves and the balance of power. Today, that state-based system has become unstable. As traditional threats to national security have receded, international policy-making has turned to such relatively new issues as the environment, human rights, trade, health, and development, along with the new

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security threat of terrorism. The shift has brought a variety of new actors—some governmental, many not—into the realm of international decision-making. No longer do foreign ministries, or even states, enjoy an unchallenged monopoly on the course of international affairs. The communications revolution and economic integration, meanwhile, have suggested a diluted significance to territorial control and the very meaning of national boundaries.

These and other related developments loosely fall under the descriptive moniker of “globalization.” The term is now firmly a part of our everyday lexicon, taken to represent the various facets of the post-Cold War world. Globalization has been the subject of a growing number of commentaries by prominent opinion writers.¹ It has also given rise to a burgeoning academic literature in such fields as political science,² sociology,³ economics,⁴ anthropology,⁵ and even geography.⁶ And yet globalization

¹ See, e.g., THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999); WILLIAM GREIDER, *ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM* (1997); JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *A FUTURE PERFECT: THE CHALLENGE AND HIDDEN PROMISE OF GLOBALIZATION* (2000); DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE WORLD* (1998); G. PASCAL ZACHARY, *THE GLOBAL ME* (2000).

² Indeed, the globalization literature in political science and other fields is now so vast that any set of references will necessarily be selective. Noteworthy contributions include BENJAMIN R. BARBER, *JIHAD V. MCWORLD* (1996); DAVID J. ELKINS, *BEYOND SOVEREIGNTY: TERRITORY AND POLITICAL ECONOMY IN THE TWENTY-FIRST CENTURY* (1995); JEAN-MARIE GUÉHENNO, *THE END OF THE NATION-STATE* (Victoria Elliott trans., 1995); MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2000); DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* (1999); ANDREW LINKLATER, *THE TRANSFORMATION OF POLITICAL COMMUNITY: ETHICAL FOUNDATIONS OF THE POST-WESTPHALIAN ERA* (1998); JAN AART SCHOLTE, *GLOBALIZATION: A CRITICAL INTRODUCTION* (2000); and PAUL WAPNER, *ENVIRONMENTAL ACTIVISM AND WORLD CIVIC POLITICS* (1996). A sign of globalization's hold is reflected in the appearance of a contrarian literature asserting the durability of the old order. See, e.g., PAUL N. DOREMUS ET AL., *THE MYTH OF THE GLOBAL CORPORATION* (1998); MICHAEL R. FOWLER & JULIE M. BUNCK, *LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY* (1995); LINDA WEISS, *THE MYTH OF THE POWERLESS STATE* (1998). It is, of course, also evidenced by the significant opposition that globalization has generated, both in the academy and among activists. See, e.g., ZYGMUNT BAUMAN, *GLOBALIZATION: THE HUMAN CONSEQUENCES* (1998) (arguing that globalization divides more than it unites); *INEQUALITY, GLOBALIZATION, AND WORLD POLITICS* (Andrew Hurrell & Ngaire Woods eds., 1999) (examining the increasing social and legal inequalities generated by globalization).

³ See, e.g., MARTIN ALBROW, *THE GLOBAL AGE: STATE AND SOCIETY BEYOND MODERNITY* (1997); ANTHONY GIDDENS, *RUNAWAY WORLD: HOW GLOBALIZATION IS RESHAPING OUR LIVES* (2000); SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996).

⁴ See, e.g., ROBERT GILPIN, *THE CHALLENGE OF GLOBAL CAPITALISM: THE WORLD ECONOMY IN THE 21ST CENTURY* (2000); PAUL HIRST & GRAHAME THOMPSON, *GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE* (1996); *GLOBALIZATION AND PROGRESSIVE ECONOMIC POLICY* (Dean Baker et al. eds., 1998).

⁵ See, e.g., ARJUN APPADURAI, *MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION* (1996); LINDA BASCH ET AL., *NATIONS UNBOUND: TRANSNATIONAL PROJECTS,*

appears barely to have registered on the consciousness of constitutional law scholars.⁷ The legal academy appears to be suspended in a sort of splendid isolation, either oblivious to recent developments (unlikely, given the widespread attention afforded them in the mainstream media),⁸ persuaded that globalization is irrelevant to the study of constitutional law,⁹ or ill-equipped to process the implications of the change.¹⁰

POSTCOLONIAL PREDICAMENTS, AND DETERRITORIALIZED NATION-STATES (1994); GLOBALIZATION AND IDENTITY: DIALECTICS OF FLOW AND CLOSURE (Birgit Meyer & Peter Geschiere eds., 1999).

⁶ See, e.g., NESTED IDENTITIES: NATIONALISM, TERRITORY AND SCALE (1999) (Guntram H. Herb & David H. Kaplan eds., 1999) (considering the relationship of territory to identity in the face of globalization); Alexander B. Murphy, *The Sovereign State System as Political-Territorial Ideal*, in STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 81 (Thomas J. Biersteker & Cynthia Weber eds., 1996).

⁷ For some terse speculations on the consequences of globalization for American constitutional law, see Marci A. Hamilton, *Slouching Toward Globalization: Charting the Pitfalls in the Drive to Internationalize Religious Human Rights*, 46 EMORY L.J. 307 (1997) (exploring the implications of globalization for constitutional rights implicating religion); Frank I. Michelman, *W(h)ither the Constitution?*, 21 CARDOZO L. REV. 1063, 1071–83 (2000) (suggesting that the combination of privatization and globalization could mark the dawn of a new era of deregulation); and Robert Post, *The Challenge of Globalization to American Public Law Scholarship*, 2 THEORETICAL INQUIRIES IN LAW 323 (2001), available at <http://www.bepress.com/til/default/vol2/iss1/art11> (last visited Jan. 21, 2002) (sketching possible intellectual responses to globalization and issues of institutional legitimation at the international level). Some leading constitutional law scholars recognize the possible relevance of international structures to constitutional law. See, e.g., Mark Tushnet, *The Canon(s) of Constitutional Law: An Introduction*, 17 CONST. COMM. 187, 194 (2000) (“[C]onstitutional law in the next decade is likely to grapple with the implications of globalization for the domestic political regime . . . I might be wrong, but at least for the next couple of years there is reason to take up the implications of . . . international law[] for U.S. constitutional law.”). Judith Resnik has recently produced an important article that considers the structural implications of globalization in the context of women’s rights and federalism, some themes of which parallel those made in this article. See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

⁸ Indeed, the saturation use of the term “globalization” suggests one possibility for the failure of legal scholars to focus on the phenomenon: a fear of beating well-worn paths rather than clearing new ones. This is evidenced by a general sense that the term is already cliché. See, e.g., Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247, 1272 (1996) (“It is difficult to avoid cliché in describing the integration of the world economy or the rapid globalization of information flows.”); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1306 (1999) (referring to the “clichéd label globalization”); cf. GIDDENS, *supra* note 3, at 25 (noting that the word “has come from nowhere to be almost everywhere”). But that feeling can only result from the label’s success; it now seems fairly clear that “globalization” will in fact identify the current era. Avoiding the term makes about as much sense as avoiding the label “Cold War” or, for that matter, “international,” which was itself only coined in the late 18th century. In the absence of some other characterization loosely signifying the many components that come under its umbrella, academics should lose their embarrassment and accept the word as part of our vocabulary.

⁹ Globalization appears to have made more significant inroads in other areas of American legal scholarship. Not surprisingly, it prominently figures in recent work in the field of intellectual

This article problemizes that isolation. It suggests that, at a minimum, constitutional law scholars confront globalization with respect to constitutional doctrine conceived on old-world premises. Rules of constitutional law governing the relationship of the United States to the rest of the world have always reflected the structure of the international system. Indeed, these rules were effectively dictated by that system so long as it portended great perils to the Union, at the necessary expense of other constitutional norms. It is through this lens that one can both explain and defend the special rules of constitutional law that have applied in the realm of foreign relations. These rules have included the political question doctrine, under which the courts have refrained from intervening in foreign relations controversies;¹¹ the exclusion of state governments from foreign relations activity;¹² and the judicial and statutory derogation of individual rights where their vindication might undermine

property. *See, e.g.,* Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996); Neil W. Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VANDERBILT L. REV. 217 (1998); Symposium, *Sovereignty and the Globalization of Intellectual Property*, 6 INDIANA J. GLOB. LEG. STUD. 1 (1998). Other fields with recent prominent offerings exploring the implications of globalization include bankruptcy, tax, corporate law, and securities regulation. *See, e.g.,* Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000); Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999); Merritt B. Fox, *The Political Economy of Statutory Reach: U.S. Disclosure Rules in a Globalizing Market for Securities*, 97 MICH. L. REV. 696 (1998); Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177 (2000); Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276 (2000). The effects of globalization on the practice of law have also been widely studied. *See, e.g.,* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001).

¹⁰ This possibility would be rooted in part in the law school curriculum. As Martin Flaherty observes, "[w]herever else they get it, law students do not encounter the world outside our borders through American constitutional law casebooks." Martin S. Flaherty, *Aim Globally*, 17 CONST. COMM. 205, 208 (2000). Among other lawyers, constitutional law scholars are thus perhaps unlikely to have significant grounding in international law and the global system. That is perhaps as good an explanation as any for their failure to confront globalization. Of course, globalization is a programmatic buzzword at many American law schools, *see, e.g.,* James Traub, *John Sexton Pleads (and Pleads and Pleads) His Case*, N.Y. TIMES, May 25, 1997, § 6 (Magazine), at 27 (describing globalization program at New York University Law School), making it all the stranger that it has yet fully to be confronted among law scholars. But as Flaherty notes, "[g]lobal' programs, courses, journals, conferences, exchanges, and internships flourish. This form of flourishing, however, has taken place almost entirely within its own nook." Flaherty, *supra*, at 217.

¹¹ *See, e.g.,* Goldwater v. Carter, 444 U.S. 996 (1979) (refusing to rule on the power of the President to unilaterally terminate a treaty); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918) (refusing to consider the legitimacy of the government of Mexico under international law).

¹² *See, e.g.,* *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (striking down a state tax that was inconsistent with the need "to speak[] with one voice" in foreign relations); *Zschernig v. Miller*, 389 U.S. 429 (1968) (striking down a state probate statute found to interfere with foreign relations).

national security.¹³

These rules were justifiable (if not always justified) in a world of hostile nation-states. But all should be reexamined in globalization's wake. As the use of armed force overseas comes increasingly to resemble law enforcement (in name and substance), with no serious threat to the national survival, as other states come to understand the component parts of United States government (at both the state and federal level) to be disaggregated actors autonomous within their areas of responsibility, and as global economic interdependence and competition make possible direct international discipline of these disaggregated actors, there is less cause to depart from default rules that would otherwise govern institutional allocations of power or individual protections from them. As this article will demonstrate, these developments bring into question the heretofore peremptory functional justifications for the special rules of foreign relations law.

I will not be the first to question what I have called the "foreign affairs differential."¹⁴ Indeed, scholarly assaults on these rules antedate the advent of globalization¹⁵ and have been reinforced in the work of a new generation of foreign relations law scholars.¹⁶ These other critiques work from a premise of constitutional

¹³ See, e.g., Logan Act, 18 U.S.C. § 953 (2000) (criminalizing certain communications with foreign governments); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (finding an alien to enjoy no due process protection in exclusion proceedings).

¹⁴ See Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1223 (1999). I prefer the tag to Curtis Bradley's "foreign affairs exceptionalism" insofar as his implies an illegitimacy to these special rules, where I assert their mere obsolescence. See Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089 (1999); see also Louis Henkin, *The Constitution for Its Third Century: Foreign Affairs*, 83 AM. J. INT'L L. 713, 716 (1989) ("Foreign affairs are likely to remain constitutionally 'special' in the next century, as they have been in the past two.").

¹⁵ For a discussion of the political question doctrine, see, for example, THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* (1992); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 314–21 (1990); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 214–24 (1990); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976) [hereinafter Henkin, *Political Question Doctrine*]; Michael E. Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135 (1970). See Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821 (1989), for a discussion of the ouster of states from foreign relations. For an analysis of limitations on individual rights, especially in the immigration context, see, for example, T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989); Louis H. Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

¹⁶ This new generation of foreign relations law scholars is dominated by a group I have elsewhere described as the "New Sovereignists," including most notably Curtis Bradley, Jack Goldsmith, Michael Ramsey, and John Yoo. See Peter J. Spiro, *The New Sovereignists*, FOREIGN AFF., Nov.–Dec. 2000, at 9. The New Sovereignists are methodically working their way through

the foreign relations law canon with revisionist attacks on a longstanding academic consensus in the area, represented at its zenith by the *Restatement (Third) of Foreign Relations Law of the United States*, Louis Henkin, and his protégés among the following generation of foreign relations law scholars. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (2d ed. 1996); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 836 (1997) [hereinafter Bradley & Goldsmith, *Critique*] (attacking the “Restatement view” of the status of customary international law as “pure bootstrapping” on the part of Henkin, its Chief Reporter); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1857 (1998) (defending the role of the Restatement in formulating foreign relations law); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 377–80 (1997) (defending the integrity of the Restatement position). The New Sovereignists tar this group as “internationalist” in their premises. See, e.g., Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 539 (1999); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1976–82 (1999) [hereinafter Yoo, *Non-Self-Execution*] (describing the “internationalist view” of the non-self-execution doctrine); see also John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205 (2000) (contrasting the “Globalist” and “Americanist” perspectives on the relationship between the United States and international institutions). The New Sovereignists have questioned two of the three doctrinal components of the foreign relations differential that I focus on in this article: the rule of federal exclusivity and its corollary that customary international law should be a part of federal common law, see Bradley & Goldsmith, *Critique, supra* (questioning the incorporation of customary international law into federal common law); Jack L. Goldsmith, *Federal Courts, Federalism, and Foreign Affairs*, 83 VA. L. REV. 1617 (1997) (attacking dormant foreign affairs power) [hereinafter Goldsmith, *Federalism*]; Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999) (same), and the application of the political question doctrine in the foreign relations context. See Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1427–28 (1999) [hereinafter Goldsmith, *New Formalism*]. They have also attacked a broad reading of the Treaty Power as against federalism concerns, see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) [hereinafter Bradley, *Treaty Power*]; justified the pervasive U.S. practice of qualifying its accession to international human rights convention, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 402 (2000) [hereinafter Bradley & Goldsmith, *Conditional Consent*]; questioned the rule of statutory construction under which domestic statutes are to be read consistently with international law whenever possible, see Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998); denied that treaties can be judicially cognizable in the absence of legislative implementation, see Yoo, *Non-Self-Execution, supra*; and asserted the constitutional irrelevance of international law to war powers decision-making, see John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673 (2000) [hereinafter Yoo, *War Powers*]. New Sovereignism is grounded in a general skepticism of international law and international lawmaking processes. See Spiro, *supra*; see also, e.g., Bradley & Goldsmith, *Critique, supra*, at 838–42 (describing features of “new” customary international law, including that “it increasingly purports to regulate a state’s treatment of its own citizens”); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L.

endogeneity, deploying such standard constitutional law metrics as original intent, doctrinal rationality, and domestic functional efficiency.¹⁷ These strategies can hardly be deployed without reference to international context, at least as a historical matter. But even recent commentary on foreign relations law issues has paid little heed to the possible consequences of globalization.¹⁸ Other critiques of foreign relations law

REV. 1113 (1999) (explaining customary international law as entirely based on the self-interested behavior of states).

The debate is also being engaged in the historical context, most notably with Ted White's intellectual history tracing many elements of the foreign affairs differential to academic innovations of the first half of the twentieth-century. See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999). In White's framework, these differentials are considered revisionist rather than historically contingent, thus making them vulnerable to attack on grounds having nothing to do with the global context in which they developed or in which they should be abandoned. White's treatment stands in contrast to Sarah Cleveland's work situating the rise of the plenary power doctrine over immigration, Native Americans, and overseas possessions in an international law context. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 70 GEO. WASH. L. REV. (forthcoming 2002).

¹⁷ See, e.g., FRANCK, *supra* note 15, at 61–96 (arguing that, political question doctrine notwithstanding, courts have often reached the merits in cases involving foreign relations); Bradley, *The Treaty Power*, *supra* note 16, at 409–22 (arguing the absence of historical basis for a broad reading of the Treaty Power); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 258 (2000) (arguing that the plenary power cases could have reached the same results without deploying the doctrine); Goldsmith, *Federalism*, *supra* note 16, at 1641–64 (arguing that constitutional practice before 1964 did not support federal exclusivity over foreign relations); Goldsmith, *New Formalism*, *supra* note 16 (arguing that the political question, act of state, and dormant foreign affairs preemption doctrines all underwent problematic transformation during the early 1960s).

¹⁸ Although vague nods are made in its direction, lively recent exchanges in the area have left the consequences of globalization largely unexamined. Both camps in the debate are generally to be faulted for overlooking the significance of structural changes in the global system wrought by globalization; each is backward looking in its contextual orientation. The New Sovereignists seem to pine for the days before the centralization of foreign relations powers in the federal government, combining historical, originalist, and other methodologies. Whether or not such days have ever existed, this group of scholars takes only passing notice of new realities posed by globalization. Amidst the many recent articles by Professors Bradley and Goldsmith, for instance, there are only a few passing references to the phenomenon. The title notwithstanding (“Globalism and the Constitution”), John Yoo's recent article on the self-execution doctrine deploys globalization only briefly, and then only for the proposition that globalization has broadened the substantive scope of international treaty regimes. See Yoo, *Non-Self-Execution*, *supra* note 16, at 1967–69. Those supporting the Restatement positions seem largely stuck on pre-globalization assumptions of the primacy of the nation-state, as well as of traditional methods of international lawmaking and their incorporation into domestic law. The work of such scholars as Harold Koh, Gerald Neuman, David Golove, and Beth Stephens also skims over the advent of globalization. See, e.g., David M. Golove, *Treaty-Making and the Nation*, 98 MICH. L. REV. 1075, 1305–06 (2000) (asserting in a brief discussion that globalization does not require a reassessment of the federal treaty power);

doctrines fail to address sequencing issues; they are left asserting, in effect, that much of foreign relations law has long been unconstitutional¹⁹ and reduced to calling for reform on a “better late than never” basis.²⁰ The strategy pursued here, by contrast, calculates the possible abandonment of the rules and explains why they may be abandoned now as opposed to some other point in time.²¹

Part II of this article unpacks critical components of globalization. I first explore the institutionalization of interstate relations and the reduced risk of full-scale armed conflict on a twentieth-century scale. At this trend’s core one finds the concept of the “democratic peace,” which holds that democratic states do not make war on one another. As democracy prevails at the global level, the risk of a level of hostilities witnessed in the World Wars and threatened in the Cold War is now slight, even implausible. Terrorism, of course, has emerged as a serious security threat; this section offers some necessarily tentative thoughts on the events of September 11, 2001. The attacks were no doubt of signal importance, demonstrating grave vulnerabilities in a globalized world. But terrorism is more akin to criminal activity

Harold Hongju Koh, *Bringing International Law Home*, 35 Hous. L. Rev. 623, 674 (1998) (adverting to globalization only in the context of bringing illiberal states into compliance with international law); Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMM. 33, 34 (1997) (suggesting a treaty basis for the Religious Freedom Restoration Act, but not considering how globalization might affect the question); Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations,”* 42 WM. & MARY L. REV. 447, 552–57 (2000) (considering the scope of congressional power without reference to the advent of globalization). To the extent that they confront it at all, it is met with skepticism, if not hostility. See, e.g., Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1655–56 (1999) (asserting the relevance of international law, but dispelling the impression that protection of civil liberties and civil rights should depend on global institutions); see also Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1238–39 (2000) (questioning whether a “much-ballyhooed leap into globalization” is revolutionary, and even if so, whether it has any necessary constitutional significance).

¹⁹ See, e.g., Goldsmith, *Federalism*, *supra* note 16, at 1622 (asserting that the “federal common law of foreign relations as currently practiced by courts and understood by scholars lacks justification”); Ramsey, *supra* note 16, at 431 (concluding that the modern view of foreign policy preemption is unsupported by the original understanding).

²⁰ See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 233 (2001) (offering an originalist interpretation of allocation of foreign affairs powers by wiping “the . . . slate clean and start[ing] over”).

²¹ Sarah Cleveland’s approach suggestively parallels that pursued here. Though her treatment is primarily historical, and focuses on the context of international law more than international decision-making structures, she too asks whether doctrines that were founded on particular elements of the international context should not be adjusted as those elements have been abandoned or transformed. See Cleveland, *supra* note 16, at 228 (“[I]f the government’s constitutional *authority* derives from customary international law, shouldn’t the authority likewise be limited by customary international law *constraints*? . . . If U.S. authority derived from international law, should those powers evolve as international norms develop?”).

than interstate hostilities, presenting a qualitatively different magnitude of threat and inviting qualitatively different responses. However devastating the September 11 attacks may have been, especially in its impact on the American national psyche, the terrorist menace is unlikely to prove to be of the same order as the Cold War threat from Moscow; however much of a threat it poses, it will not be on the order of that posed by an enemy empire. Even taking September 11 into account, then, the stakes in foreign relations have changed.

Second, I consider globalization's disaggregation of the state. In the old international structure, states were treated as unitary (aggregated) entities; international rules took no account of constituent actors within states. Today, the international community is coming increasingly to understand the role and responsibilities of particular actors within states, including subnational authorities, corporations, and individuals, and is increasingly coming to interact directly with those constituent parts. As a result, the conduct of any component part is less likely to be mistaken as the responsibility of the whole. The state no doubt continues to be a privileged actor in international relations, but it appears to have lost its previous near-monopoly hold. As the third critical component of globalization, finally, I briefly describe the intensified competition among states that has come with economic globalization. This embedded economic interdependence affords international actors the capacity to hold disaggregated actors responsible to international norms.

Part III describes the special rules of foreign relations law, and why they are appropriately contested in the face of these three strands of globalization. The political question doctrine was premised on both the high stakes of foreign relations and the aggregated treatment of states; the courts shrunk from intervention in foreign relations matters for fear that misjudgment could have disastrous consequences for the nation, in part because such misjudgment could be taken as a national position by international actors. Today, insofar as the nature of the threat has changed, we can afford errors on the judiciary's part in most contexts, even more so because other nations will understand that such misjudgment is on the part of the courts only, and should not be taken as representing the views of other governmental entities.

Likewise the rule against state-level foreign policy-making. The nation as a whole was, in the old world of aggregated nations, held responsible for the actions of individual U.S. states, an intolerable proposition in the face of intolerable consequences; we could not have a Massachusetts or a California, for instance, starting us down the road to World War III. To the extent that international actors understand the autonomy of a Massachusetts or California, and can respond discretely against them to remedy non-compliance with international norms, the risk of such consequences will diminish, and the differential may no longer be sustainable.

Finally, the changed nature of international threats eliminates the justification for a different definition of rights in the national security context. This Part first

highlights legislative provisions (including the Logan Act)²² and constitutional powers (to terminate citizenship for conducting political activities in another state and to deny a passport for purposes of international travel) that reflected the former aggregation of the individual to the state. This discussion also focuses on the extreme differential constitutional treatment of aliens and argues that globalization may render the differential in large part obsolete. Indeed, judicial decisions and other relevant practice indicate that the foreign relations differential in the context of individual rights has already narrowed. In the wake of September 11, of course, this trend will be tested. Its reversal is not inevitable, however. Indeed, the resistance to limiting civil liberties even in the immediate aftershock of September 11 has been remarkable. And to the extent that rights have been constrained, it has largely been undifferentiated, that is, with no particular reference to foreign relations or an international context. Even alien rights have suffered only marginal reversals as a result of the attacks.

The article concludes, in Part IV, with a suggestion of globalization's broader future reach into American constitutional law. To the extent that globalization gives the international community the means to discipline even the United States, the United States may be incapable of resisting the legal reach of globalization. Global context dictates only those rules that implicate the global; but it is the global community, and not any objective criteria, that constructs the line between global and domestic. In the past, that line has left most of American constitutional law (foreign relations law doctrines aside) firmly on the domestic side of the divide. That placement is no longer so clear today. Much of our constitutional jurisprudence—especially constitutional rights jurisprudence—addresses issues that now present international concerns.²³ International actors may be able to exploit vulnerabilities created by disaggregation and heightened economic competition to advance related international norms. No longer will the reach of the outside world be limited to doctrines, such as those considered in Part III, that are by their terms related to foreign relations. At the long-term end point of this dynamic, the Constitution may become something of an artifact, a regulator of secondary norms, no longer a quantity that can

²² 18 U.S.C. § 953 (2000).

²³ This development has been brought into focus with recent international protests regarding continued American use of the death penalty, especially as applied to juvenile offenders and the mentally retarded. See, e.g., *Europe's View of the Death Penalty*, N.Y. TIMES, May 13, 2001, § 4, at 12 ("In our reliance on capital punishment, America stands apart from the other progressive democracies."); *The World's View of Executions*, N.Y. TIMES, June 13, 2001, at A32 (asserting that the death penalty is, "as President Bush is learning, a foreign policy liability"). Structural features of globalization will also likely reverse recently revived assertions of American sovereignty associated with the rejection of major international treaties such as the Kyoto climate change accords. See *infra* notes 285–89; see also, e.g., Thomas Friedman, *Noblesse Oblige*, N.Y. TIMES, July 31, 2001, at A19 (reporting that the United States is being characterized as a "rogue state" among Europeans for its refusal to join various international regimes); Thom Shanker, *White House Says U.S. is Not a Loner, Just Choosy*, N.Y. TIMES, July 31, 2001, at A1 (reporting the Bush Administration's defense of its rejection of international treaties).

intelligently be studied in isolation.

Two important cautions are warranted up front. First, it is not the purpose of this article comprehensively to document the elements of globalization. That is a subject requiring volumes, many of which have been already written. Rather, the article seeks to explore the implications of globalization if in fact the critical elements highlighted below become embedded. If globalization proves a false dawn, then these speculations may amount to naught.²⁴ But if it proves durable, the implications are of such gravity as to warrant consideration at this time, even at risk of appearing to jump the gun. The exercise may be framed as a thought experiment and a matter of institutional logics, if it helps the reader beyond the hurdle of empirical objection, however well grounded those objections may be. The exercise may be valuable as such, insofar as it challenges foundational notions of constitutional process and the persistently reified nation-state.

Second, this article is hardly offered by way of celebration. Globalization holds much promise and much peril.²⁵ There is nothing utopian about globalization. September 11 is itself a product of globalization. Among other perils is the possibility that rights, justice, and dignity will be compromised in structures and processes that go under-examined. To the extent that American constitutionalists continue to conceive of the Constitution as an insular affair, they may miss the primary action as it unfolds elsewhere. Opportunities for the expansion of rights and dignity may be lost, instances of their diminishment may go undefended. In that respect, this article waves a warning flag to those—progressives and conservatives alike—who would persist in an almost defiant disdain and willful blindness of international law and international lawmaking processes. Constitutional autarchy no longer presents a viable position. Globalization may mark a transformation of millennial proportions. It is time for the American legal academy to begin to grapple with it.

II. GLOBALIZATION'S ARCHITECTURE

Globalization means different things to different people.²⁶ Most observers would

²⁴ See, e.g., Peter Beinart, *An Illusion for Our Time: The False Promises of Globalization*, NEW REPUBLIC, Oct. 20, 1997, at 10 (drawing parallels between current economic conditions and those prevailing at the beginning of the twentieth-century, with an obvious cautionary message).

²⁵ Part of that promise is found in the asserted obsolescence of the foreign relations law doctrines examined in this article, the abandonment of which most would welcome. But as I stress in Part III below, that is a case only of eliminating a differential, with a reversion to baselines whose legitimacy was established through conventional domestic law processes. Insofar as global processes come to dictate norms outside of the foreign relations law context, however, their content will not be normatively deterministic. That presents a much broader threat to constitutional values.

²⁶ See, e.g., Jan Aart Scholte, *Beyond the Buzzword: Towards a Critical Theory of Globalization*, in GLOBALIZATION: THEORY AND PRACTICE 43, 45 (Eleonore Kofman & Gillian Youngs eds., 1996) ("To some extent, no doubt, globalization is a buzzword, a term as ambiguous as it is popular.").

agree that globalization defines a series of developments that were accelerated by (if not premised on) the end of the Cold War.²⁷ Most accounts of globalization also stress the significance of improved information and communication tools in diminishing the costs otherwise posed by geographical distance,²⁸ and many highlight the integration of global economic markets.²⁹ Beyond that, globalization is so broad a phenomenon that comprehensive description now seems almost futile. Scholars have responded with selective treatments, tailored to particular issues or developments.

This Part focuses on three elements of globalization that seem critical to the future course of foreign relations law: the institutionalization of interstate relations, the disaggregation of the nation-state, and economic globalization. All three represent reversals of entrenched constructs on which the foundations of foreign relations law were built.

A. *International Relations Institutionalized*

For much of the modern period, nation-states confronted each other in a proto-anarchical arena characterized by only the loosest constraints on self-interested behavior. Interstate relations was a game of power projection and self-help. However

²⁷ See FRIEDMAN, *supra* note 1, at 355. As Thomas Friedman suggests:

What should Mr. Clinton have said at his first inaugural? Something like this: "My fellow Americans, my tenure as your President is coinciding with the end of the Cold War system and the rise of globalization. Globalization is to the 1990s and the next millennium what the Cold War was to the 1950s through the 1980s"

Id. Of course, one has to shrink from crude periodization. Many of globalization's roots stretch back into the near and distant past; it is impossible to say that globalization emerged suddenly in 1990. See, e.g., HAROLD JAMES, *THE END OF GLOBALIZATION: LESSONS FROM THE GREAT DEPRESSION* (2001); KEVIN H. O'ROURKE & JEFFREY G. WILLIAMSON, *GLOBALIZATION AND HISTORY: THE EVOLUTION OF A NINETEENTH-CENTURY ATLANTIC ECONOMY* (1999); Michael D. Bordo et al., *Is Globalisation Today Really Different from Globalisation a Hundred Years Ago?*, in *GLOBALISATION AND INTERNATIONAL TRADE LIBERALISATION* 17 (Martin Richardson ed., 2000). But to the extent that periodization is a necessary element in historical characterization, it seems fair to mark the end of the Cold War as the juncture at which globalization prevailed. The Cold War period was dominated by features—most notably the threat of catastrophic interstate conflict—inconsistent with globalization's premises.

²⁸ See, e.g., SCHOLTE, *supra* note 2, at 20 (noting that globalization is "widely associated with technological revolutions in transport, communications and data processing"); Jessica T. Mathews, *Are Networks Better Than Nations?*, *NEW PERSPECTIVES Q.*, Mar. 1997, at 10 ("Above all, the information technologies disrupt hierarchies, diffusing and redistributing power."); Lester C. Thurow, *Globalization: The Product of a Knowledge-Based Economy*, 570 *ANNALS AM. ACAD. POL. & SOC. SCI.* 19, 20 (2000) ("[New] technologies and their interactions are producing a knowledge-based economy that is systematically changing how all people conduct their economic and social lives.").

²⁹ See generally, e.g., GRIEDER, *supra* note 1, at 11–53 (describing the globalization of trade); HELD, *supra* note 2, at 149–88 (same).

refined it emerged with respect to a select few activities, international law was blind to many areas of state conduct. Even in those areas in which it applied, international law was enforced mostly on an ad hoc horizontal basis, that is, by formally equal actors against each other in a largely uncoordinated and extrainstitutional dynamic. The use of force, whether to enforce obligations or simply to extend power, was an accepted part of the international landscape. War was a constant threat, in response to intended aggression or perceived slight.

Today, by contrast, interstate relations are increasingly mediated through rationalized institutional processes.³⁰ Even where they lack formal and/or effective enforcement powers, many such institutions have accreted a legitimacy that affords them top-down decision-making authority. This is perhaps most apparent in the context of international economic relations. Where states were once free to set the terms of, and terminate, economic dealings with other countries as they pleased, most have accepted significant constraints on that discretion under the General Agreement on Trade and Tariffs. GATT obligations are now decided in the dispute resolution arms of the World Trade Organization.³¹ The WTO may have no armed forces to impose its judgments, but early practice evidences a clear pull toward compliance with its decisions. Regularized dispute resolution lowers the risk that limited disputes will spiral into broad ones;³² the likelihood of escalating rounds of trade-related retaliation—of a trade “war”—between major economic states has become improbable. Although the trade context presents perhaps the clearest example of the institutionalization of interstate relations, others abound. Thick regulatory regimes are issuing from international institutions in such diverse areas as environmental protection, individual rights, labor conditions, intellectual property, public health, and

³⁰ See generally, e.g., DANIEL J. ELAZAR, *CONSTITUTIONALIZING GLOBALIZATION* 19 (1998) (highlighting the “network of agreements that are not only militarily and economically binding for de facto reasons but [that] are becoming constitutionally binding, de jure”); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT’L L. & BUS. 398, 431 (describing “institutionalized supervisory mechanisms for the systematic monitoring of the implementation of their international agreements”); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT’L L. 489, 489–90 (2001) (“The solution of vital problems . . . has moved beyond the reach of individual states and has called for institutionalized commitment and cooperation on global and regional levels.”). This institutionalization is a prominent component of “global governance” perspectives on international relations in the wake of globalization. See generally, e.g., THE COMMISSION ON GLOBAL GOVERNANCE, *OUR GLOBAL NEIGHBOURHOOD: THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE* (1995); *APPROACHES TO GLOBAL GOVERNANCE THEORY* (Martin Hewson & Timothy J. Sinclair eds., 1999).

³¹ On the elaborate dispute resolution system of the WTO, see, for example, JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND WTO* 113–92 (2000).

³² See, e.g., GILBERT R. WINHAM, *THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS* 42 (1992) (“[T]he world trade system of the 1990s is less vulnerable to breakdown than was that of the 1930s . . .”); Mike Moore, *Multilateralism and the WTO*, in *GLOBALISATION AND INTERNATIONAL TRADE LIBERALISATION* 137 (Martin Richardson ed., 2000).

endangered species.³³ Indeed, all governance issues have some corresponding international outlet.

This institutionalization has facilitated greater stability in relations among states. Just as the development of legitimated domestic institutions diminishes the incentives for vigilantism, the development of international ones diminishes the incentives for self-help in the form of the use of military force. War was always a costly option, but it often presented a rational means for settling international disputes or enforcing international norms. Institutionalization reduces the cases in which resort to force passes this cost/benefit test. If states are willing to submit to dispute-resolution processes, the incentive to use force dissipates. At least among states that accept institutionalization, an end to uncabined armed conflict ensues. This occurs (perhaps counter-intuitively) even as the overall stakes implicated by global governance regimes increase.

This institutionalization thesis correlates to the notion of the democratic peace. In its narrower conception, the democratic peace has nothing to do with globalization; as a thesis, it simply holds that democracies do not make war on one another,³⁴ and of course democracy as a form of government long antedates the advent of globalization.³⁵ What ties the democratic peace to globalization is the possibility of its accomplishment through the spread of democratic government. The number of democracies worldwide has increased dramatically since 1989.³⁶ There are today few

³³ See, e.g., *ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS* (Edith Brown Weiss & Harold K. Jacobson eds., 1998); *THE INTERNATIONALIZATION OF ENVIRONMENTAL PROTECTION* (Miranda A. Schreurs & Elizabeth Economy eds., 1997); *MANAGING GLOBAL ISSUES* (P.J. Simmons & Chantal de Jonge Oudraat eds., 2001); *THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY* (Anne F. Bayefsky ed., 2000).

³⁴ On the democratic peace, see generally *DEBATING THE DEMOCRATIC PEACE* (Michael E. Brown et al. eds., 1996); BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD* (1993); SPENCER R. WEART, *NEVER AT WAR: WHY DEMOCRACIES WILL NOT FIGHT ONE ANOTHER* (1998); Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151 (1986); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205 (1983); and Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995). The democratic peace thesis applies to interstate war. But democracy has consequences for internal stability as well. One recent study estimated that autocracies were more than twice as likely to suffer violent internal conflict than democracies. See TED ROBERT GURR ET AL., *PEACE AND CONFLICT 2001: A GLOBAL SURVEY OF ARMED CONFLICTS, SELF-DETERMINATION MOVEMENTS, AND DEMOCRACY* 20 (2001).

³⁵ The theory of the democratic peace itself dates to the 18th century political philosopher Immanuel Kant. See Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in KANT'S POLITICAL WRITINGS 93 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991); see also Erik Gartzke, *Kant We All Just Get Along? Opportunity, Willingness, and the Origins of the Democratic Peace*, 42 AM. J. POL. SCI. 1 (1998).

³⁶ GURR, *supra* note 34, at 19 (noting that "[a]s recently as 1978 autocracies outnumbered democracies by more than two to one," a ratio reversed by 1994); Adrian Karatnycky, *The Comparative Survey of Freedom 1996-1997: Freedom on the March*, in *FREEDOM IN THE WORLD*:

states of military or economic significance that are not classified at least as transitional democracies. The spread of democracy is arguably a byproduct of globalization;³⁷ once democracy takes hold, the forces of globalization appear to render reversal nearly impossible.³⁸ Thus, even if institutionalization remains incomplete at the international level, international stability may be the byproduct of globalization.

Whatever its origins,³⁹ the fact remains that at no time in modern history—at no time since the founding of the Republic—has the prospect of war among major nations seemed so slight.⁴⁰ Since the early 1990s, the number and magnitude of armed conflicts within and among states have decreased by nearly half.⁴¹ The possibility that the United States will face an armed attack by another nation seems improbable. Whatever national security threats the United States faces today, it will not be on the order of Nazi Germany or the Soviet Union. This era of globalization will not be characterized, as was the last, by staggering casualties on the battlefield or deprivations on the home front, the hallmarks of total war between peoples. The very notion of “enemy” states seems to have lost meaning.⁴²

This is emphatically not to say that international tranquility prevails, that threats to national security no longer exist, or that there will never be armed international hostilities to which the United States will be party.⁴³ In fact, of course, there is a certainty of continuing strife in various corners of the world, and the near-certainty of future military engagements resulting from that strife, of the sort, for example, undertaken in Kosovo and Afghanistan, invariably implicating the declining numbers of non-democratic states who are non-participants in the institutionalization of interstate relations. But these perils are of a completely different order from that posed by real war. Kosovo and other engagements of the post-Cold War world have all

THE ANNUAL SURVEY OF POLITICAL RIGHTS & CIVIL LIBERTIES 1996–97, at 5 (1997) (number of democracies has grown from 69 in 1987 to 118 in 1997); *see also* THE GLOBAL RESURGENCE OF DEMOCRACY (Larry Diamond & Marc F. Plattner eds., 2d ed. 1996).

³⁷ *See, e.g.*, GIDDENS, *supra* note 3, at 23 (“Globalisation lies behind the expansion of democracy.”).

³⁸ *Cf.* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992) (concluding that democracy is becoming a requirement of international law).

³⁹ Some contest the democratic peace thesis, at least as a historical matter. *See, e.g.*, Christopher Layne, *Kant or Cant: The Myth of the Democratic Peace*, INT’L SECURITY, Fall 1994, at 5 (arguing that the theory does not bear historical scrutiny).

⁴⁰ *See, e.g.*, David A. Westbrook, *Law Through War*, 48 BUFF. L. REV. 299, 330 (2000) (“The current imagination of international relations is circular . . . and warfare is simply out of the circle.”).

⁴¹ *See* GURR, *supra* note 34, at 9.

⁴² *See, e.g.*, GIDDENS, *supra* note 3, at 36 (“[F]ollowing the dissolving of the Cold War, most nations no longer have enemies. Who are the enemies of Britain, or France, or Brazil?”).

⁴³ It is, however, surely the case that the media highlights ongoing conflict at the expense of more encouraging news. *See* G. Pascal Zachary, *Give Hope a Headline*, FOREIGN POL’Y, Jan./Feb. 2001, at 78 (“By missing stories of hope, the media contribute to a pervasive sense that nothing goes right in the world.”).

(with the possible exception of the Persian Gulf War) involved a limited commitment of resources and a limited risk of casualties.⁴⁴ Such engagements often come under the category of “peacekeeping operations” or “international police actions,” rather than “war.”⁴⁵ This is not the kind of conflict that implicates the dangers of the World or Cold Wars. Even the recent operation in Afghanistan, although repeatedly described as “war” (or at least an element thereof),⁴⁶ hardly qualifies as such in historical context. The size of the force deployed (3,000)⁴⁷ is comparable to recent peacekeeping deployments and police actions. The Afghanistan deployment is minute compared to hostilities historically denominated as “war.” As with other recent deployments, U.S. armed forces have suffered minimal casualties.⁴⁸ The deployment itself (as opposed to the attacks to which it responded) has had few domestic consequences.⁴⁹ This is not a conflict that will see significant economic repercussions, much less the ration books of World War II. Even the vocabulary of warfare seems out of place. No state has been put forth as the enemy; it has not been the people of Afghanistan that the United States is opposed to, but rather a leadership (the Taliban) recognized by few as legitimate either in Afghanistan or in the international community.⁵⁰

Terrorism is another story. As demonstrated by the events of September 11,

⁴⁴ See, e.g., William Schneider, *Pols Staying Out of Harm's Way*, 31 NAT'L J. 2850 (1999) (describing new military and political strategies in which the risk of even minimal casualties is considered unacceptable).

⁴⁵ See, e.g., HARDT & NEGRI, *supra* note 2, at 12 (asserting that “war is reduced to the status of police action”); Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: “The Old Order Changeth,”* 85 AM. J. INT'L L. 63 (1991); Charles William Maynes, *Relearning Intervention*, FOREIGN POL'Y, Spring 1995, at 96 (describing how peacekeeping operations have emerged as a high priority security issue); Jim Hoagland, *The Trouble with Playing Global Cop*, WASH. POST, Sept. 2, 1999, at A39 (describing recent military deployments as “police actions”).

⁴⁶ See, e.g., Presidential Response Concerning the Events of September 11, 2001, 2001 U.S.C.C.A.N. D37, D39 (“Americans are asking: How will we fight and win this war?”); *War Without Illusions*, N.Y. TIMES, Sept. 15, 2001, at A22 (“There is no doubt that this week’s terrorist attacks on New York and Washington were the opening salvos in the first American war of the 21st century.”).

⁴⁷ See COALITION INFORMATION CENTERS, THE GLOBAL WAR ON TERRORISM: THE FIRST 100 DAYS 11 (2001), available at <http://www.whitehouse.gov/news/releases/2001/12/100dayreport.html#6> (White House press release describing troops deployed in Afghanistan).

⁴⁸ As of the end of January 2002, the United States had suffered only two casualties as a result hostile action, one of whom was a Central Intelligence agent killed in the wake of the prison uprising at Mazar-e-Sharif. See *U.S. Deaths During Afghanistan Campaign*, ST. PETERSBURG TIMES, Jan. 22, 2002, at 6A.

⁴⁹ See, e.g., Frank Rich, *Patriotism on the Cheap*, N.Y. TIMES, Jan. 5, 2002, at A11 (“We all applaud our selfless men and women in uniform, whether at ground zero or in battle, but we are not inclined to make even a fractionally commensurate sacrifice of our own.”).

⁵⁰ See, e.g., *President Bush's Address on Terrorism Before a Joint Meeting of Congress*, N.Y. TIMES, Sept. 21, 2001, at B4 (“The United States respects the people of Afghanistan. After all, we are currently its largest source of humanitarian aid. But we condemn the Taliban regime.”).

international terrorism presents a serious continuing threat to physical security. Indeed, in the current context, terrorism portends a more significant direct threat than does force projection by another state. The number of casualties from the World Trade Center attack dwarfs military losses in any conflict since Vietnam, never mind the prospect of a biological, chemical, or nuclear terrorist attack.⁵¹ Terrorism also has a substantial home front impact. In many respects, terrorism makes obsolete the very notion of a war front. With the exception of those suffered as a result of the full-blown military air assault on Pearl Harbor, the September 11 casualties were the greatest ever suffered in any attack in the United States. Manifestations of the response to terrorism are omnipresent in our daily routines. Most of these encounters amount to mere inconveniences, little more than reminders of the attacks. But in the aggregate, they have significant economic implications, real and potential.⁵²

One cannot underestimate the magnitude of the terrorist threat. But terrorism presents a qualitatively different kind of threat than that previously presented by total war among states. Terrorism, first of all, ultimately reduces to a kind of criminal activity, which can be addressed as such. That has gone without saying in those cases in which the terrorist agent is domestic—the Oklahoma City bombing case presenting the obvious example. But instances of international terrorism have also been prosecuted in the courts, including attacks undertaken by bin Laden operatives against U.S. embassies in Africa and the 1993 World Trade Center truck bombing.⁵³ An alleged co-conspirator in the September 11 attacks is being tried on various criminal law counts in the federal court.⁵⁴ Terrorism no doubt has significant implications for law enforcement techniques (including closer collaboration among states in international law enforcement),⁵⁵ but it can be conceived as such.

War between nations, by contrast, does not lend itself to a law enforcement model. As a historical matter, war itself did not constitute a violation of any legal norm. Even in the wake of the United Nations Charter and its formal prohibition on

⁵¹ See, e.g., William J. Broad et al., *Assessing Risks, Chemical, Biological, Even Nuclear*, N.Y. TIMES, Nov. 1, 2001, at A1.

⁵² See, e.g., Richard Berner, *The Terror Economy*, N.Y. TIMES, Oct. 23, 2001, at A23 (“Terrorism is also causing a . . . persistent kind of damage as it forces what are likely to be lasting changes in the way Americans do business and lead their lives.”); *Is It at Risk?*, THE ECONOMIST, Feb. 2, 2002, at 65 (describing a “security tax” involved in higher insurance premiums, border delays, and increased transportation costs brought on by the September 11 attacks).

⁵³ See Benjamin Weiser, *4 Guilty in Terror Bombings of 2 U.S. Embassies in Africa; Jury to Weigh 2 Executions*, N.Y. TIMES, May 30, 2001, at A1.

⁵⁴ See Jane Fritsch, *Man Named in Terror Conspiracy Ordered to Virginia for Trial*, N.Y. TIMES, Dec. 14, 2001, at B6 (reporting on the prosecution of Zacarias Moussaoui).

⁵⁵ See, e.g., Philip Stephens, *A Solo Performer by Nature*, FIN. TIMES, Nov. 23, 2001, at 21 (describing how September 11 has facilitated multilateral undertakings); Tim Weiner, *The Building of a Network That Is Global and Reliable*, N.Y. TIMES, Sept. 23, 2001, at B7 (highlighting the new relevance of the international Interpol police network).

most uses of force,⁵⁶ however, military conflict transpired as part of a conflict between peoples, as represented by states.⁵⁷ There was an “us” and a “them”—populations that could be correlated to territories controlled by governments with status under international law. Even where a state violated norms against the use of force, it remained difficult to undertake the conflict as a law enforcement operation. The Cold War, in particular, could hardly be characterized as law enforcement; at the time, it amounted to a competition of ideologies, each of which had secured international legitimacy. However illegitimate communism may appear in retrospect, at least in its Soviet application, it would be hard then or now to condemn the Soviet Union as illegal and efforts to bring about its downfall as law enforcement.

Along similar lines, the distinction between terrorism and war may reduce to one of magnitude. Assuming that terrorism does not emerge from the front line of a clash of civilizations scenario⁵⁸ (in which case we are very much in an “us” and “them” situation), the terrorist threat will be a lesser one. Even the most alarmist predictions of future terrorist action could not result in the losses of the World Wars, much less the plausible threat of annihilation suffered through the Cold War. In historical relief, the events of September 11 may not loom as large as they do today. Perhaps it was a fluke of sorts, an attack ruthlessly and precisely executed exploiting a low-tech vulnerability. If the United States does not suffer another significant terrorist attack in, say, the next five years, September 11 may emerge as less of a watershed. But even if terrorists continue to undertake successful attacks, it will not be war, at least not in anything other than a colloquial sense.⁵⁹

Whatever the nature of the terrorist threat, it appears not to be one that pits states against each other, or at least not states representing significant power. That is

⁵⁶ See U.N. CHARTER art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”).

⁵⁷ Hence my hesitation to use the United Nations itself as part of the institutionalization thesis or the ban on the use of force included in the U.N. Charter. For more than forty years, the Charter’s prohibition gave global governance and international law a bad name, so little did its aspirations coincide with realities on the ground. Today, however, the United Nations does play a critical role in institutionalization, as an umbrella organization if nothing else. (Even such organizations as the International Monetary Fund are, at least as a nominal matter, United Nations agencies.) The prohibition on the use of force has also become consequential, as the end of the Cold War stalemate has permitted the Security Council to assume its contemplated role as a guarantor of collective security. That role is shared with others (as demonstrated by the North Atlantic Treaty Organization’s lead in the Kosovo episode), but accepted unilateral uses of force are becoming more circumscribed than in the past, limited to instances of clear self-defense.

⁵⁸ Samuel P. Huntington propounds the clash of civilizations scenario in his now-celebrated thesis. See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

⁵⁹ That is, in the sense of the “war on drugs,” or indeed the “war on crime.” See, e.g., Bruce Ackerman, *War Is Handy Politics for Bush*, L.A. TIMES, Feb. 3, 2002, at M5 (“Inflated war talk is a defining characteristic of the modern presidency . . .”).

demonstrated by the nearly universal support extended the United States by other governments in the wake of September 11; every government save Iraq and Afghanistan condemned the attacks.⁶⁰ That response seems consistent with the institutionalization thesis. Considering the shock effect of September 11, the stability of interstate relations has in some respects been remarkable. In other contexts, conflicts are now institutionally managed, reducing the danger of uncabined conflict. That marks a departure from historically hair-trigger conditions of interstate relations, in which armed interstate hostilities loomed as a persistent, frightful specter. This new stability is consequential for foreign relations law doctrines established on different premises. Doctrines contingent on a world of hostile, competitive interstate relations should be reexamined with the emergence of global governance systems.

B. *The Disaggregated State*

For several centuries, the international system has been conceived of as a society of states, a system that has recognized a state monopoly on power and legitimacy. International law has assumed states to be unitary actors, amenable to representation by unitary governmental agents.⁶¹ In this world, states talked only to one another, and only to one another as such. Their communications were highly stylized in the form of diplomacy, the traditional model of which admits only to centralized expression of state interests through the sovereign and his representatives to other states (in the form of ambassadors and the rest of the diplomatic apparatus). In that world—the world of the Westphalian system⁶²—states did not trouble themselves with, and would take no

⁶⁰ See, e.g., John Diamond, *Shaping Allies from Enmity*, CHI. TRIB., Sept. 26, 2001, at 4 (noting that of the seven nations—Iraq, Syria, Sudan, Libya, Cuba and North Korea—designated by the Department of State as sponsors of terrorism, only Iraq had failed to extend condolences in the wake of the September 11 attacks).

⁶¹ This premise of traditional international law can be traced back to the image of states as natural persons, a metaphor that has, until recent years, pervaded the understanding of international relations and the organization of international institutions. See Edwin DeWitt Dickinson, *The Analogy Between Natural Persons and International Persons in the Law of Nations*, 26 YALE L.J. 564 (1917). The analogy may date from a period in which the king as sovereign was indistinguishable from his realm. See JULIUS GOEBEL, JR., *THE EQUALITY OF STATES: A STUDY IN THE HISTORY OF LAW* 47 (1923) (noting that in medieval times, “the state had personality in the person of its ruler”). It has persisted through the modern period. See, e.g., WILLIAM BLOOM, *PERSONAL IDENTITY, NATIONAL IDENTITY AND INTERNATIONAL RELATIONS* 1–3 (1990) (highlighting quotidian language in which states are described to act with “apparently coherent personalities”); HANS J. MORGENTHAU, *SCIENTIFIC MAN VS. POWER POLITICS* 113 (1946) (noting that comparison has been the “main stock in trade” of the modern international relations scholarship).

⁶² See, e.g., Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT’L L. 20, 28 (1948) (describing Westphalia as “the majestic portal which leads from the old world into the new world”); see also DANIEL PHILPOTT, *REVOLUTIONS IN SOVEREIGNTY* 75–110 (2001) (describing the epochal significance of Westphalia as ushering in the era of the dominant state).

cognizance of, other components of foreign states. As to each other, states were opaque.⁶³

As an important corollary, central governments have been held responsible for the conduct of their component parts. Thus, central governments through the agency of foreign ministries have been held responsible for the conduct of subunit or component governmental actors,⁶⁴ as well as for the conduct of citizens and subjects (artificial and human),⁶⁵ where it implicated relations with other states. This facet of traditional international relations has been formalized in the doctrine of state responsibility,⁶⁶ under which states have been held responsible for the acts of their component parts, in the way domestic law holds parents responsible for the acts of their children.

In the old world, this doctrine both reflected and reinforced a reality of central government control and centralized relations among states in the international arena. Against the backdrop of thin communication networks and diverse systems of government, it would have been highly inefficient to require states to interact with component units of other states. It would also have been difficult for states to enforce obligations against those component units, for their leverage would, in most cases, have been minimal; greater international conflict would have been the result. Better to require that central governments police their own domains, the interposition of domestic constitutional arrangements notwithstanding, insofar as central governments were best positioned to discipline potentially disruptive actors. This international legal

⁶³ In the classic metaphor of the Realist School of international relations theory, states have been as billiard balls to one another. See, e.g., ARNOLD WOLFERS, *DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS* 19–24 (1962); see also GUÉHENNO, *supra* note 2, at x (“The cold war acted like a vast magnet on the iron filings of political institutions . . .”).

⁶⁴ See, e.g., RESTATEMENT (THIRD), *supra* note 16, § 207(b) & n.3; EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 199–202 (1915); CLYDE EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* 32–35 (1928); Harvard Law School, *Research in International Law: Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, art. 3 & cmt., reprinted in 23 AM. J. INT’L L. 133, 145 (Supp. pt. 2 1929) [hereinafter *Harvard Research*].

⁶⁵ See, e.g., *Trail Smelter Arbitration* (U.S. v. Can.), 3 R.I.A.A. 1911, 1933 (1938) (finding a state responsible for transboundary harm caused by a company located in its territory); EAGLETON, *supra* note 64, at 80 (“A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction.”); PHILIP QUINCY WRIGHT, *THE ENFORCEMENT OF INTERNATIONAL LAW THROUGH MUNICIPAL LAW IN THE UNITED STATES* 5 (1916) (“The essential feature of international law is not that it lays down rules of conduct for states, but that it holds states responsible for the conduct of persons.”); W. Friedmann, *The Growth of State Control Over the Individual, and Its Effect Upon the Rules of International State Responsibility*, 19 BRIT. Y.B. INT’L L. 118, 142–43 (1938) (observing that states are vicariously liable for international delinquencies committed by individuals). The responsibility for states for the conduct of individuals has been less complete than that for component governmental units. See *infra* notes 202–10 and accompanying text.

⁶⁶ See, e.g., RESTATEMENT (THIRD), *supra* note 16, § 207.

responsibility in turn reinforced highly channeled interstate interaction through diplomatic agents. Regardless of the source of offense, a state sought redress through diplomatic contacts.⁶⁷ If redress were not forthcoming, the injured state could respond in an undifferentiated manner against the state whose component engaged in the unlawful act.⁶⁸

But this model of international relations now faces serious pressures from developments on the ground. Perhaps most notably, where states used to deal with one another through centralized agents, the channels of communication have multiplied. As Anne-Marie Slaughter has demonstrated, central governments increasingly interact through a variety of decentralized networks outside of foreign ministries.⁶⁹ Centralized diplomacy is in decline. Officials with substantive responsibilities in a particular area institutionalize relationships with their counterparts in other governments, often out of sight of national chief executives.⁷⁰ Likewise with respect to governmental subunits; where provincial and municipal authorities used to have at most sporadic interaction with foreign government entities, such contacts are now routine.⁷¹ Direct relationships between foreign actors and private entities—corporate and individual—are so multifarious as to seem unworthy of remark.⁷² As such decentralized relationships intensify, states come to understand the structure of other states; the transaction costs of direct communication with component units correspondingly diminishes. (Indeed, it may be less efficient to communicate through centralized agents, insofar as such communication will implicate the transaction costs

⁶⁷ See, e.g., Claims, 6 Moore DIGEST § 970.

⁶⁸ See, e.g., BORCHARD, *supra* note 64, at 178 (“[D]iplomatic measures for the pecuniary reparation of the injury . . . may range from the diplomatic presentation of a pecuniary claim to war.”).

⁶⁹ Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.–Oct. 1997, at 183. It is to Professor Slaughter that I owe the term “disaggregated state.” See *id.* Where Professor Slaughter uses it to describe the disaggregation of national executives, however, I go further to highlight the discrete activity of other governmental and non-governmental components on the world stage.

⁷⁰ *Id.*; see also Wolfgang H. Reinicke, *The Other World Wide Web: Global Public Policy Networks*, FOREIGN POL’Y, Winter 1999–2000, at 44 (describing existence of transgovernmental policy networks).

⁷¹ See, e.g., EARL H. FRY, THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS (1998) (describing and assessing such activity); BRIAN HOCKING, LOCALIZING FOREIGN POLICY: NON-CENTRAL GOVERNMENTS AND MULTILAYERED DIPLOMACY (1993) (describing various case studies demonstrating the increased activity of subnational governments, including U.S. states, at the international level); STATES AND PROVINCES IN THE INTERNATIONAL ECONOMY (Douglas M. Brown & Earl H. Fry eds., 1993) (describing increased international economic activity).

⁷² See, e.g., Timothy Fort & Cindy Schipani, *Companies Can Help Make Peace*, FIN. TIMES, Nov. 21, 2001, at 16 (describing how corporate conduct can contribute to international stability); Joseph Kahn, *Multinationals Sign U.N. Pact on Rights and Environment*, N.Y. TIMES, July 27, 2000, at A3 (describing formal agreement between corporations and the United Nations).

of intra-governmental communication.) The density of such relationships will also give rise to the possibility of leverage against component units of other states,⁷³ thus diluting the necessity of central government responsibility.

International legal doctrines holding states responsible for the conduct of their constituent elements, it is true, remain firmly in place.⁷⁴ But to the extent that the unitary state has been a social construction of the international system, recent developments pose a probable challenge to the long-term hold of corresponding legal constructions.⁷⁵ As states and other international actors find that the rule of

⁷³ This leverage will most obviously take an economic form, thus combining the disaggregation phenomenon with the advent of economic globalization. *See infra* text accompanying notes 285–303. It may also play out in exercises in international shaming, as part of the international social constructs that arise in the wake of denser communications networks. *See infra* text accompanying notes 309–14. Finally, at least as a matter of theory, it can play out in the realm of force. In the Kosovo campaign, NATO attacked Serbia but not Montenegro, even though the two provinces comprise a state, on the clear premise that Montenegro should not have been held responsible for the misdeeds of the Milosevic regime. Even the response against bin Laden can be processed as part of the disaggregation of the state. Bin Laden and his Al-Qaeda organization are of course non-state entities. The Taliban regime was held responsible for harboring Al-Qaeda, but the latter is clearly considered autonomous of any state and has been pursued as such.

⁷⁴ At least with respect to component governmental units. For example, draft articles of state responsibility now being considered by the International Law Commission (something of an international equivalent to the American Law Institute and its restatements) shows no sign of retreating from longstanding doctrine under which states are held internationally responsible for the conduct of subnational units. *See Report of the International Law Commission on the Work of its Forty-Eighth Session*, art. 6, UN GAOR, 51st Sess., Supp. No. 10, at 126, UN Doc. A/51/10 (1996) (“The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ . . . holds a superior or a subordinate position in the organization of the State.”). State responsibility for individuals has been eroding for some time, however. *See infra* notes 206–10 and accompanying text.

⁷⁵ *Cf.* Friedmann, *supra* note 65, at 148 (“The law cannot ignore social change beyond a certain point, for no law can command respect which bases its rules on the society of yesterday.”). The disaggregation thesis is also bolstered by the increasingly elusive notion of “the national interest.” As Guéhenno observes:

[A]s the American economy is being internationalized, and foreigners learn their way around the American system, the notion of an American national interest expressed by the Congress of the United States is becoming more and more abstract. By definition, there is no lobby to defend the interests of the ‘American nation.’

GUÉHENNO, *supra* note 2, at 22; *see also, e.g.*, Samuel P. Huntington, *The Erosion of American National Interests*, FOREIGN AFF., Sept.–Oct. 1997, at 28; Mathews, *supra* note 28, at 13 (“The discrepancy between the fixed geography of states and the non-territorial nature of today’s problems and solutions is only likely to grow. Nation states may simply no longer be the natural problem-solving unit.”). Nor is September 11 likely to retard this trend. On the contrary, to the extent that nearly all states consider terrorism a threat, it is not distinctively in the interest of any to combat it. In this respect, the events of September 11 may actually accelerate constitutional

international law is advanced by disaggregating the state, rules of responsibility will be modified accordingly. No longer will the international system be blind to entities other than states; on the contrary, it will take account of the full range of actors engaged at the global level.

C. *Economic Globalization*

Economic globalization hinges on the mobility of capital and the globalization of markets. The two phenomena are intertwined beyond their dependence on improved communications, transportation, and travel systems. Manufacturing and service operations can be relocated with relative ease. This is partly because the engines of today's economy are more easily moved from one place to another. But it is also because in the context of a global marketplace states have facilitated the possibilities for relocation. Staying competitive in the global economy is critical to economic success,⁷⁶ and so former barriers to the movement of capital have been lowered.⁷⁷

Globalization has constrained the discretion of states not only with respect to the movement of capital, but also with respect to other forms of regulation. Mobility and the importance of attracting capital has led to unprecedented regulatory competition among states.⁷⁸ States now face a situation in which increasing regulatory burdens (including labor standards,⁷⁹ environmental controls,⁸⁰ and taxes⁸¹) may prompt the

globalization. *See infra* notes 280–95 and accompanying text.

⁷⁶ I will not pretend to undertake a survey of economic developments since the advent of globalization. A sampling of trends will suffice. Between 1990 and 1999, for example, the level of annual foreign direct-investment inflows more than tripled (from \$209 billion to \$865 billion), increasing in 1996–99 at a rate of 31% annually. *See* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *WORLD INVESTMENT REPORT 2000: CROSS-BORDER MERGERS AND ACQUISITIONS AND DEVELOPMENT* 4 (2000). The value of cross-border mergers involving U.S. entities increased more than 400% between 1995 and 1999, from \$53 billion to \$233 billion. *Id.* at 240.

⁷⁷ *See, e.g.*, JAMES H. MITTELMAN, *THE GLOBALIZATION SYNDROME: TRANSFORMATION AND RESISTANCE* 25 (2000) (“To realize material gain from globalization, the state increasingly facilitates the process, acting as its agent.”) (citations omitted). Mittelman characterizes this as a “courtesan” role for the state in the globalization construct. *Id.* at 25–26.

⁷⁸ *See, e.g.*, Richard Falk, *State of Siege: Will Globalization Win Out?*, *INT’L AFF.*, Jan. 1997, at 123, 125 (“Territorial sovereignty is being diminished on a spectrum of issues in such a serious manner as to subvert the capacity of states to control and protect the internal life of society . . .”); Saskia Sassen, *The State and the New Geography of Power*, in *THE ENDS OF GLOBALIZATION: BRINGING SOCIETY BACK IN* 49, 55–56 (Don Kalb et al. eds., 2000) (“The possibility of moving from one to another jurisdiction with lower regulatory demands, puts downward pressures on regulations across all jurisdictions . . .”).

⁷⁹ *See, e.g.*, Terry Collingsworth et al., *Labor and Free Trade: Time for a Global New Deal*, *FOREIGN AFF.*, Jan.–Feb. 1994, at 8 (asserting that state competition in the face of globalization will result in depressed labor conditions); Ethan B. Kapstein, *Workers and the World Economy*, *FOR. AFFAIRS*, May–June 1996, at 16.

⁸⁰ *See, e.g.*, Arik Levinson, *Environmental Regulations and Industry Location: International*

departure of capital.⁸²

Of course, mobility is restricted by the availability of substitutes. For underdeveloped states, the competitive restraints on regulation are greatest insofar as they are most substitutable as a location for capital. If Indonesia raises corporate taxes or imposes labor regulations, a corporation will move its operations to an India or Thailand that does not impose such burdens. Developed countries have had less to fear from such impositions, insofar as the costs of substitution are higher. For many enterprises, the costs of relocating from the United States would be high, leaving the United States with greater regulatory discretion than other states, though perhaps less than in a world of largely immobile capital.

But here is where economic globalization intersects with the disaggregation phenomenon in a way that may level the playing field. Insofar as regulatory policy is set at the subnational level, economic actors can pit subnational jurisdictions against each other as regulatory competitors. Where the United States and Mexico may not be substitutable (although they are for an increasing number of economic operations), a Tennessee and a Texas are substitutable for all but the most immobile types of businesses (the recovery of natural resources serving as the classic example). To the extent, then, that authority is found at the subnational level, even powerful nations become vulnerable to the levers of economic globalization.

As do their component parts. Obviously, as in the above explanation, national subunits must become situated in the international context. But corporations must as well. They, too, must maintain global competitiveness. Maintaining competitiveness in global markets translates in part into reducing locational costs (resulting in competition among states). But they must also protect against non-economic liabilities that may reduce their competitiveness in global markets, especially global consumer markets. At the same time as globalization has diminished state capacity to discipline corporations (one premise of the old system of state responsibility), it has added another mechanism, one that plays out across national boundaries. To the extent that corporations face the discipline of global markets on questions of operational venues (that is, where they do business), they can in turn exercise leverage over governmental authorities, central and subnational. States, non-governmental organizations (NGOs), and consumers can pressure corporations to boycott jurisdictions whose practices are for one reason or another objectionable, in which construct corporations emerge as a

and Domestic Evidence, in 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

⁸¹ See, e.g., Avi-Yonah, *supra* note 9, at 1590–92 (recounting evidence that the mobility of capital has driven down effective tax rates); see also GUÉHENNO, *supra* note 2, at 10 (“[T]axation is no longer a sovereign decision.”). The diminished capacity to tax, of course, has implications for other areas of government policy. See, e.g., DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 6 (1997) (highlighting how mobility facilitated by globalization undermines the welfare state).

⁸² See Debora Spar & David Yoffie, *Multinational Enterprises and the Prospects for Justice*, J. INT’L AFF., Spring 1999, at 557 (setting forth factors that contribute to regulatory competition).

tool for advancing international agendas.⁸³ The availability of these levers against some state components facilitates the direct responsibility of state components to international law. Economic globalization also facilitates recognition of these components and an understanding of how they are situated within the state. The mobility of capital, for instance, will increase the incentives for international actors to understand the extent of subnational authorities within particular nations, and to communicate directly with them, as well as with discrete non-diplomatic elements of central governments. In that respect economic globalization is an important cause and reinforcement of the disaggregation phenomenon. States are no longer critical to the discipline of their component parts, and they no longer need be their channel to the outside world.⁸⁴

The institutionalization of interstate relations, the disaggregation of the state, and economic globalization all suggest foundational shifts in the structure of the global system. To the extent constitutional doctrines have been grounded in the old framework, they must be reexamined against the new. Frameworks conceived in other times may emerge inappropriate in the changed global context.

III. THE HISTORICAL CONTINGENCY OF FOREIGN RELATIONS LAW

Unlike other areas of the law, foreign relations law definitionally implicates a context beyond our control. Foreign relations law may be described as that which governs the intersection of international affairs and the domestic legal regime. On domestic questions, we can at least hold out the possibility of changing the context itself, so that anything is possible. Foreign relations law, by contrast, must confront an exogenous context, something that must be taken largely as a given. This context has been particularly constraining to the extent that it has included hostile entities of equal

⁸³ See generally Peter Newell, *Environmental NGOs and Globalization: The Governance of TNCs*, in GLOBAL SOCIAL MOVEMENTS 117 (Robin Cohen & Shirin M. Rai eds., 2000); Peter J. Spiro, *New Global Potentates: Non-Governmental Organizations and the 'Unregulated' Marketplace*, 18 CARDOZO L. REV. 957 (1996); Gary Gereffi et al., *The NGO-Industrial Complex*, FOR. POL'Y, July-Aug. 2001, at 56; Sebastian Maltby, *Activists, Acting Governmental*, WASH. POST, Feb. 26, 2001, at A19; see also *infra* notes 288-89, 302-03 and accompanying text (describing examples of this dynamic).

⁸⁴ Economic globalization appears largely unaffected by September 11 attacks. See, e.g., Gerard Baker, *Globalisation Has Survived the Terrorist Attacks*, FIN. TIMES, Nov. 1, 2001, at 21; *Is it at Risk?*, *supra* note 52, at 66 ("[M]ost aspects of globalisation have survived the shocks of 2001 remarkably well."). Indeed, the dictates of economic globalization appear to have constrained the U.S. response to the terrorist attacks. For example, proposals for a moratorium on student visas were rejected in the face of a significant loss in income for educational institutions. See, e.g., Diana Jean Schemo, *Eager for Foreign Students, Universities Persuade Senator to Drop Plan to Limit Visas*, N.Y. TIMES, Nov. 18, 2001, at B7. Efforts to impose heightened security at ports of entry (especially border crossings) have come up against the costs of processing delays. See, e.g., Sam Dillon, *As Border Delays Grow, Process Draws Criticism*, N.Y. TIMES, Oct. 29, 2001, at A8.

or greater means, potential conquering adversaries, as it has since the Founding era. Because that context has threatened the entire American project, it has inevitably compromised other important constitutional values. But now that the context has changed and that threat has passed, those other values should come back to the fore. Even if the old threat has been replaced by a different one, a reassessment is in order. Globalization may eliminate the necessity for a foreign relations differential.

This section traces the roots of three core doctrines of foreign relations law to the international context in which they were developed. The doctrines are representative of the foreign relations differential; each departs from baseline constitutional norms that would otherwise prevail in the domestic sphere.⁸⁵ The political question doctrine

⁸⁵ As opposed to those doctrines of foreign relations law that are peculiar to the foreign relations context—most notably the war and treaty-making powers—and thus less easily deployed by way of demonstrating a foreign relations differential, and arguing for its abandonment. These doctrines, of course, also implicate the external global context, and they all will be impacted by globalization. But because they do not involve a differential (that is, because they do not pose a deviation from otherwise controlling constitutional norms) there will be no template for assessing this effect. With respect to these other doctrines, elements of globalization other than those featured here will likely come into play. For instance, war powers doctrine may come to be recognized with a constitutional significance in the authorization of international organizations. *See, e.g.*, Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63, 70–71, 74 (1991) (arguing that United Nation's authorization of the Korean and Gulf Wars eliminated the otherwise applicable constitutional requirement of congressional approval). *But see* Yoo, *War Powers*, *supra* note 16, at 1720–29 (rejecting the relevance of U.N. authorization). Of course, insofar as the democratic peace prevails, the war power becomes less singular; in that respect, Congress might be expected to play a more prominent role in decisions relating to the use of force. *See* Peter J. Spiro, *Old Wars/New Wars*, 37 WM. & MARY L. REV. 723 (1996) (arguing that the changing nature of warfare affords Congress greater opportunities to exercise control of the use of force).

The growth of international institutions may also pose new or revived issues of foreign relations law, relating for example to the possible application of the Appointments Clause. *See, e.g.*, Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000); John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMM. 87, 116–29 (1998) (asserting Appointments Clause "difficulties" with accession to Chemical Weapons Convention). Aside from important federalism issues, *compare* Bradley, *Treaty Power*, *supra* note 16 (asserting that federalism constraints apply to Treaty Power), *with* Golove, *supra* note 18 (rebutting Bradley's argument), it is unclear how globalization will change the contours of the treaty power. It does not cut clearly one way or the other on the choice between and acceptability of executive agreements relative to Article II treaties. *See, e.g.*, Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001) [hereinafter Spiro, *Constitutional Method*]; Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001). Implicit in the premises of this article, however, is the possibility that U.S. constitutional doctrine will bend to the dictates of globalization; insofar as it

reverses the usual presumption in favor of judicial review; federal exclusivity over foreign relations deviates from the presumption that the states play an important institutional role in our federal system; and the dilution of core individual rights in the name of national security derogates the fundamental place of such rights in our constitutional framework. All three deviations were a product of the old international dynamic, but each must be reexamined in the face of globalization. The differential may no longer be sustainable; and the usual presumptions may be vindicated.

A. The Political Question Doctrine in Matters Involving Foreign Relations

The political question doctrine dates to the very dawn of judicial review. At the same time that Justice Marshall's opinion in *Marbury v. Madison*⁸⁶ famously declared it to be the duty of the judiciary emphatically "to say what the law is,"⁸⁷ it also carved out from judicial scrutiny the exercise by the President of "certain important political powers"⁸⁸ for which he "is accountable only to his country in his political character, and to his own conscience."⁸⁹ Among such acts insulated from review—which "can never be examinable by the courts"⁹⁰—Marshall singled out those of the department of foreign affairs insofar as its officers are to "conform precisely to the will of the President."⁹¹

Courts have repeatedly invoked the political question doctrine to deny review of matters involving the nation's foreign relations, including cases involving the control of territory,⁹² recognition of governments,⁹³ and the consequences of breach by a

does not, international norms may be imposed on the United States through other mechanisms. See *infra* text accompanying notes 286–91 (describing a model in which U.S. compliance with international norms is accomplished through non-institutional channels).

Perhaps the most historically significant statement of the foreign relations differential appeared in a context in which the changes in baseline values—that is, doctrine applicable in the domestic context—changed so as to eliminate the differential. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315 (1936) (upholding the delegation of power from Congress to the Executive in a foreign relations context, even assuming such delegation to be invalid in a domestic one). At the time *Curtiss-Wright* was decided, the non-delegation doctrine still had teeth, so that in its wake a differential prevailed. However, as the non-delegation doctrine lost force in the domestic context as well, that differential was eliminated. See, e.g., *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001) (rejecting a non-delegation challenge to an environmental protection statute).

⁸⁶ 5 U.S. (1 Cranch) 137 (1803).

⁸⁷ *Id.* at 177.

⁸⁸ *Id.* at 165.

⁸⁹ *Id.* at 166.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See, e.g., *Jones v. United States*, 137 U.S. 202, 212 (1890); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839).

⁹³ See, e.g., *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137–38 (1938); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610,

treaty partner.⁹⁴ The doctrine has also barred judicial review of war powers controversies.⁹⁵ In recent decades it has come under sustained attack by the commentators.⁹⁶ In the face of these attacks, and because the doctrine deviates from the core constitutional norm in favor of judicial review, the courts have elaborately defended the doctrine. *Baker v. Carr*⁹⁷ remains the starting point. Although not implicated in the case before it,⁹⁸ the *Carr* Court highlighted the prominent application of the doctrine in cases involving foreign relations. "Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature,"⁹⁹ the Court there concluded, "but many such questions uniquely demand single-voiced statement of the Government's views."¹⁰⁰

Some of these defenses are not persuasive, at least not as the doctrine is applied to foreign relations. The argument that there are no applicable legal standards by

634-35 (1818).

⁹⁴ See, e.g., *Charlton v. Kelly*, 229 U.S. 447, 473-75 (1913); *Kwan v. United States*, 84 F. Supp. 2d 613, 623-24 (E.D. Pa. 2000).

⁹⁵ See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973); *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1967); *Lowry v. Reagan*, 676 F. Supp. 333, 339-40 (D.D.C. 1987); see also GLENNON, *supra* note 15 (attacking use of the political question doctrine in a war powers context). This article for the most part brackets issues relating to war powers. See *supra* note 85. To the extent that one is talking about real war, that is, conflict involving significant and sustained national commitments, with a high risk of casualties, see Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1348-55 (1993) (distinguishing real wars from "strike operations" and peacekeeping deployments), the possibility is inconsistent with the premise of the democratic peace. That is not to deny the possibility of real wars in the future (at least of the Persian Gulf sort), only to concede that constitutional questions arising therefrom should be addressed under old-world constructs, including the political question doctrine. To the extent, however, that war powers questions are prompted by smaller-scale deployments, there may now be room for judicial scrutiny. See *infra* note 137.

⁹⁶ See, e.g., sources cited *supra* note 15; see also Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT'L L. 805, 805 (1989) (accepting the propriety of judicial abstention in some situations involving foreign relations, but asserting that "the burden should lie heavily upon those urging the judiciary to abdicate its responsibilities").

⁹⁷ 369 U.S. 186 (1962).

⁹⁸ The *Carr* case involved the constitutionality of a state legislative districting scheme. See *id.* at 187-88. On the political question doctrine beyond the foreign relations context, see, for example, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 183-200 (1962); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); and Martin H. Redish, *Judicial Review and the 'Political Question'*, 79 NW. U. L. REV. 1031 (1985).

⁹⁹ *Carr*, 369 U.S. at 211.

¹⁰⁰ *Id.* These three factors are among the six identified as among the "several formulations which vary slightly according to the settings in which the questions arise." *Id.* at 217 (highlighting the "lack of judicially discoverable and manageable standards for resolving" a dispute, a "textually demonstrable constitutional commitment of the issue to a coordinate political department," and the "potentiality of embarrassment from multifarious pronouncements by various departments on one question," as among those justifying application of the doctrine).

which to determine a rule of decision is, first of all, alternatively circular or self-fulfilling. The sorts of issues posed by foreign relations law are not as a matter of legal interpretation inherently different from other questions of law.¹⁰¹ In this respect the rationale is circular. Of course, to the extent that the courts have consistently refused to inject themselves in controversies relating to foreign relations, judicial precedent in the area is considerably less refined; application of the political question doctrine itself leads to the paucity of standards as articulated by the courts. In this respect the rationale is self-fulfilling, but unpersuasive, nonetheless: there are other standards to apply than those found in the case reports. In historical practice, most notably, one can usually delineate constitutional standards in the area.¹⁰² In those instances in which the courts have ruled on the merits, they have demonstrated the capacity to find applicable standards in these non-judicial precedents.¹⁰³

Likewise with respect to cases assertedly "involv[ing] the exercise of a discretion demonstrably committed to the executive or legislature."¹⁰⁴ The framework for finding "demonstrable commitment" has never been adequately sketched, beyond the argument that it can be detected in the constitutional text itself. Indeed, as Professor Henkin has noted, there seems no constitutional power for which demonstrable commitment is established.¹⁰⁵ Outside of the foreign relations context, those constitutional provisions that seem most amenable to such interpretation have not been insulated from judicial consideration.¹⁰⁶ The "demonstrable commitment"

¹⁰¹ Take the notable invocation of the political question doctrine by a four-justice plurality in *Goldwater v. Carter* 444 U.S. 996 (1979). *Goldwater* involved the question of whether the President may unilaterally terminate an Article II treaty approved by the Senate. Justice Rehnquist stressed the Constitution's silence on the issue of treaty termination, arguing that the absence of a governing provision left the question to be governed by political standards, not judicial ones. See *id.* at 1003 (Rehnquist, J., concurring). But the fact that the constitutional text leaves an issue unanswered cannot stand as an excuse for judicial restraint; controversies that find their way to the Court almost inherently involve such questions. See *infra* note 103 (rebutting the argument that foreign affairs cases transcend judicial competence).

¹⁰² See, e.g., Spiro, *Constitutional Method*, *supra* note 85, at 733–43 (setting forth a model for processing the constitutional significance of particular historical episodes).

¹⁰³ Where courts have adjudicated foreign relations cases on the merits, it is often to history that they turn by way of precedent. In *Dames & Moore v. Regan*, for example, the Court traced a long practice under which presidents have unilaterally (that is, without participation of Congress) settled claims and controversies with foreign nations through so-called sole executive agreements. 453 U.S. 654, 679–83 (1981); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.").

¹⁰⁴ *Carr*, 369 U.S. at 211.

¹⁰⁵ Henkin, *Political Question Doctrine*, *supra* note 15, at 603–05.

¹⁰⁶ See, e.g., *Powell v. McCormack*, 395 U.S. 486, 515–21 (1969) (finding expulsion of congressman by House of Representatives to be justiciable notwithstanding its power under Article I, section 5, to expel a member by two-thirds vote).

rationale is, in short, makeweight.

The weakness of these rationales is not to argue the indefensibility of the political question doctrine, at least against the old-world backdrop. But the doctrine appropriately stood only on justifications that correlated to that backdrop, justifications that supported this differential treatment of foreign relations cases. First has been the "high stakes" rationale for non-review of foreign relations matters, a rationale that, while not included in the standard list of political questions (absent, most notably, from the catalogue of *Baker v. Carr*), has clearly figured in some applications of the doctrine.¹⁰⁷ Of course, the courts will often rule on controversies of fundamental importance; "high stakes," by itself, doesn't seem to demand judicial restraint. But high stakes in the international context are different from high stakes in the domestic context to the extent that the implication of third parties (read: foreign countries) beyond our control greatly magnifies the risk of error. If a court makes a mistake in the domestic context, there are various mechanisms by which to overcome that error and minimize its damage. In the international context, the commission of the error can, at least in theory, spark a chain of events taking the matter out of our hands, so that the damage is irretrievable. And in the international context that damage has been, as a historical matter, potentially severe. In the worst case, a dispute provoked by judicial error could plausibly have led the country into armed hostilities with another state;¹⁰⁸ as the Court noted in *Oetjen v. Central Leather Co.*,¹⁰⁹ to get it wrong (in that case, deciding which government legitimately ruled post-revolutionary Russia) would "imperil the amicable relations between governments and vex the peace of nations."¹¹⁰ That prospect sufficed to overcome the ordinary presumption in favor of judicial review; if one accepts the underlying model, it seems difficult to argue otherwise.

The risk of error has, at least in the past, been compounded by a lack of judicial expertise with respect to foreign policy, at least relative to the executive branch. Indeed, beyond *Carr*'s inventory, it is perhaps the profession of institutional incompetence that has most frequently justified judicial abstention from ruling on foreign relations controversies.¹¹¹ At one level this incompetence was clearly

¹⁰⁷ See, e.g., BICKEL, *supra* note 98, at 184 (including as justifications for application of the doctrine "the sheer momentousness of [an issue], which tends to unbalance judicial judgment"); see also FRANCK, *supra* note 15, at 50–58 (attacking "too much at stake" defense of political question doctrine).

¹⁰⁸ Leaving aside the case where the United States is already engaged in such hostilities. In the case of real war, see *supra* note 95, the enormity of the stakes are self evident, implicating at least American lives and possibly national survival. Even a small risk of judicial error in that context emerged intolerable.

¹⁰⁹ 246 U.S. 297 (1918).

¹¹⁰ *Id.* at 304.

¹¹¹ See, e.g., *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (foreign relations decisions "are . . . of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not

overblown. Courts rule all the time in much more complex (not to mention dull) areas of law; it is hard to argue that the average federal judge, even in the era before globalization, was less informed on matters of foreign affairs than on such issues as energy regulation, bankruptcy law, or the federal pension regime.¹¹² To the extent that challenge was one of distinguishing those cases directly implicating relations with other countries from those that did not, the courts have always commanded a requisite understanding of international affairs.¹¹³ Where the foreign relations context did (at least in the era before globalization) put the courts at a potential institutional disadvantage was in securing full information. What has distinguished foreign relations from other matters of policy is the accepted element of secrecy, both in information gathering and policy implementation. As Justice Jackson observed in the *Waterman* decision, the President “has available intelligence services whose reports are not and ought not be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.”¹¹⁴ Even if it would have been

subject to judicial intrusion or inquiry”).

¹¹² Jonathan Charney observes:

The role of the judiciary in these cases does not differ from that played in other cases it routinely decides. The courts are provided with the necessary information by attorneys acting in their roles as advocates. . . .

. . . In purely domestic cases, novel and highly complex technical issues are regularly and successfully addressed.

Charney, *supra* note 96, at 809; *see also* KOH, *supra* note 15, at 221–22 (highlighting “demonstrated ability [of the courts] in domestic cases to derive workable standards from even the vaguest constitutional provisions”).

¹¹³ Thus I disagree with Jack Goldsmith’s conclusion that federal courts cannot, “in the absence of guidance from the political branches, accurately determine when and how foreign relations interests require abstention or preemption.” Goldsmith, *New Formalism*, *supra* note 16, at 1415. The determination of whether a case affected U.S. relations with international actors was a fairly straightforward calculation, at least before globalization complicated the very meaning of the nation. *See* Spiro, *supra* note 14, at 1256–57.

¹¹⁴ 333 U.S. at 111. Although the observation no doubt held true in some contexts, it is almost amusing that it was delivered in a case involving a dispute over the granting of a Caribbean air route to Chicago, hardly a matter of great international moment. *See also* *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (“[The President] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.”); *cf. Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (upholding delegation of power to prohibit travel to Cuba in part on the grounds that “the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress”). The observation would, again, best apply in the context of controversies relating to military conflict. *See, e.g., Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973) (refusing to review challenge to bombing of Cambodia on political question grounds; “[w]e are not privy to the information supplied to the Executive by his professional military and diplomatic

the rare case in which an undisclosed back story would have skewed judicial decision-making, the fact that in any given case the courts could not have been confident of full information justified their passivity, at least in light of the downside risks of error.

There remains, of course, the question of how misjudgments on the part of the courts might have undermined American interests on the international plane. Here the old-world conception of the unitary state presented the critical contextual vector. Because states were assumed to be unitary, any act of the courts was considered an act of state, for which the state was held responsible—hence *Baker v. Carr*'s justification of non-review as avoiding "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."¹¹⁵ Though cryptic at first glance, the use of the word "embarrassment"—a persistent riff in foreign relations law doctrine¹¹⁶—implies both the presence of an outside entity and a framework of responsibility; one cannot be embarrassed except in relation to others, and one is not embarrassed for anything for which one does not feel responsible. In this case the "others" are foreign countries, and the responsibility has been imposed by international law.¹¹⁷ Indeed, the courts have shown a demonstrably greater willingness to entertain foreign relations matters that do not directly implicate other countries.¹¹⁸ Where they have, the embarrassment avoided might have been literal, for

advisers and even if we were, we are hardly competent to evaluate it").

¹¹⁵ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹¹⁶ See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 434–35 (1968) (striking down a state law the application of which posed "great potential for disruption or embarrassment" at the international level); *Hirota v. MacArthur*, 335 U.S. 876, 878 (1948) (denying jurisdiction over war crimes trials on the ground that it was "bound to embarrass the United States" with respect to allied nations jointly overseeing the process); *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) (asserting "that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations"); *Curtiss-Wright*, 299 U.S. at 320 (observing that the need to avoid embarrassment justifies affording the President "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved"); *United States v. Lee*, 106 U.S. 196, 209 (1882) ("In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction."). For a misapplication of the concept, see *Padavan v. United States*, 82 F.3d 23, 27 (2d Cir. 1996) (rejecting a claim by state officials against the federal government for costs associated with illegal immigration; "this court's adjudication of questions as to the success or failure of the federal government's immigration policy poses a grave risk of national embarrassment").

¹¹⁷ See *supra* notes 64–66.

¹¹⁸ See, e.g., *New York Times v. United States*, 403 U.S. 713 (1971) (refusing to enjoin publication of the Pentagon Papers); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (dispute over seizure of steel mills by presidential proclamation); see also *Goldwater v. Carter*, 444 U.S. 996, 1004–05 (1979) (Rehnquist, J., concurring) (distinguishing *Youngstown* from case in which effect would be "entirely external to the United States, and [falls] within the category of foreign affairs"). One can, with this distinction, explain virtually all of the cases that Franck highlights in asserting a "significant countervailing trend [towards a] nonabdicationist

the nation's diplomatic representatives, faced with offended foreign officials whose goodwill (at the very least) would be more difficult to secure on other issues as a result of the judicial miscue (especially to the extent that the executive branch felt obligated to respect the judicial action).¹¹⁹ Embarrassment results as well when those diplomats are left to grapple with a decision undercutting their efforts with foreign counterparts. It is the fact and features of the exogenous context that have dictated that the nation "speak with one voice"¹²⁰ when it comes to foreign relations (another

jurisprudence." FRANCK, *supra* note 15, at 61. See generally *id.* at 61–96 (describing cases in which courts have rejected application of the political question doctrine in foreign relations cases). The few cases in which courts have gone to the merits in cases directly implicating relations with other countries all seem to have approved political branch action. This is true of the two most frequently cited decisions refusing to apply the doctrine in the foreign relations context. The Court in *Dames & Moore* upheld the constitutionality of a U.S. agreement with Iran to end the 1978–81 hostage crisis. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In *Japan Whaling*, the Court found an executive agreement with Japan to satisfy a statutory mandate to impose sanctions on states violating international prohibitions on whaling. See *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 241 (1986); see also Goldsmith, *New Formalism*, *supra* note 16, at 1403 n.30 (citing only *Dames & Moore* and *Japan Whaling* for the proposition that courts often adjudicate cases with significant foreign relations implications); *id.* at 1427–28 (holding out *Japan Whaling* as evidence that the Court has adopted a "new formalism" in which courts adjudicate foreign relations cases "without [the] safety valve of abstention"). Because both decisions on the merits merely confirmed executive branch action—as would, of course, have been true if the decisions had been grounded in the political question doctrine—there was no danger of upsetting the bilateral relationships involved. Cf. Henkin, *Political Question Doctrine*, *supra* note 15, at 606 (arguing that invocation of political question doctrine disguises rulings on the merits in support of executive branch action). Indeed, the other countries would have had no need even to take note of the decisions. These exceptions to application of the political question doctrine in the pre-globalization era are thus consistent with the "embarrassment" rationale, and by themselves present a thin basis for asserting that courts have or should participate in foreign relations decision-making.

¹¹⁹ Here one finds a subsidiary justification for judicial reticence in the sphere of foreign relations: that there is a higher risk than in other areas that the political branches will simply ignore judicial attempts at constraint, with consequential damage to the institutional legitimacy of the courts. See, e.g., *United States v. Lee*, 106 U.S. 196, 209 (1882) (observing that courts should abstain from deciding foreign relations cases because they lack "the power to adjust them"); CHOPER, *supra* note 98, at 129–70 (approving the argument as a basis for judicial restraint); FRANCK, *supra* note 15, at 57–59 (describing and rebutting this basis for the political question doctrine in foreign relations law cases); Chamey, *supra* note 96, at 811 (same). This concern surely has contributed to the consistent refusal of the courts to rule on questions involving the commitment of forces into combat.

¹²⁰ The phrase appears first to have been used by Justice Frankfurter in his concurrence in *United States v. Pink*. See 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring) ("In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states."); see also, e.g., Chamey, *supra* note 96, at 811–12 (describing "one voice" rationale to support the political question doctrine in a foreign relations context).

persistent theme in foreign relations law) and that that voice not be the judiciary's. Assuming the sensitivity of foreign relations, and the danger that judicial intervention will upset that balance, non-review emerges supportable.

The same assumptions justified the correlate act of state doctrine,¹²¹ under which U.S. courts have refused to examine the validity of acts undertaken by a foreign government in its own territory.¹²² If anything, the act of state doctrine was more clearly mandated by the structure of the old global system.¹²³ By definition, the cases directly involved the interests of a foreign state. The prospect of finding a foreign state's conduct to be invalid almost necessarily posed a risk to foreign relations with that state,¹²⁴ even where such acts were validated, such relations could be complicated and U.S. interests undermined.¹²⁵ It is no surprise, then, that the act of state cases lean heavily on the "embarrassment" and similar rationales emphasizing the consequences for national relations with the state involved.¹²⁶ As in the political question cases, the act of state decisions showed a consciousness of the peculiar stakes of foreign relations and were necessarily premised on the aggregated state.

But as discussed in Part II, those assumptions seem weak in the face of globalization. The international system is far less fragile today than in the recent past, and the risks of catastrophic developments are slight. The hazards of judicial error (even assuming the continuing conceptions of state responsibility) have been reduced accordingly. The courts are not going to lead us into World War III, or a trade war, or any other serious conflict; the institutional infrastructure at the international level now

¹²¹ See *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 715–16 (1976) (Marshall, J., dissenting); *Doe v. Braden*, 57 U.S. (1 How.) 635, 657–59 (1853) (noting shared foundations for the two doctrines); FRANCK, *supra* note 15, at 98 (asserting that the act of state and political question doctrines have been treated as "more or less interchangeable").

¹²² See RESTATEMENT (THIRD), *supra* note 16, § 443; see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (refusing to consider the legality of Cuban expropriation); *Underhill v. Hernandez*, 168 U.S. 250 (1897) (refusing to entertain a damage suit arising from detention by the government of Venezuela).

¹²³ Even though, like the political question doctrine, it enjoyed only "constitutional underpinnings" rather than a constitutional mandate. See *Sabbatino*, 376 U.S. at 423.

¹²⁴ See, e.g., *Sabbatino*, 376 U.S. at 432 (noting that when the executive branch has refrained from claims of international law violations, "a determination to that effect by a court might be regarded as a serious insult . . . [e]ven if the State Department has proclaimed the impropriety of the expropriation, the stamp of approval of its view by a judicial tribunal, however impartial, might increase any affront").

¹²⁵ *Id.* (noting "serious and far-reaching consequences" of a judicial finding of validity contrary to the executive branch's view).

¹²⁶ See, e.g., *id.* at 433 (explaining that "the very expression of judicial uncertainty might provide embarrassment to the Executive Branch"); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1380 (5th Cir. 1980) ("Relegating grievances from acts of this sort to executive channels of international diplomacy, the rule is an embodiment of the deference to be accorded the sovereignty of other nations; it averts potential diplomatic embarrassment from the courts of one sovereign sitting in judgment over the public acts of another.").

includes multiple safeguards against such results. The likelihood of judicial error has also diminished as more international policy is undertaken openly by a variety of actors (public and private), and with little or no reliance on secret channels of information or action.¹²⁷ The threat of terrorism does not sustain this differential; there is no risk of courts upsetting delicate or sensitive relations with terrorist entities any more than courts risk upsetting drug cartels or other criminal organizations.¹²⁸ Insofar as the risks and likelihood of error have thus been reduced, it seems no longer justifiable to suppress the otherwise strong constitutional presumptions in favor of judicial review.

The decline of state responsibility supports this notion even more so. Where other nations in the past would have held U.S. representatives accountable for judicial decision-making, today they are likely to be more understanding. This is in part an empathetic phenomenon; most countries now have independent judiciaries of their own, and their representatives have a first-hand knowledge that courts are not instruments of national executives.¹²⁹ It has also resulted from the increasing sophistication of other countries when it comes to internal U.S. governance structures. Foreign governments not only understand the status of courts in the United States, they are beginning to play the system directly. There are many recent examples of prominent foreign government participation in U.S. judicial proceedings not just as defendants (which more likely involves a lack of sophistication) but increasingly as plaintiffs¹³⁰ and amici curiae¹³¹ in a broad range of cases.

¹²⁷ See, e.g., Ann Florini, *The End of Secrecy*, FOREIGN POL'Y, June 22, 1998, at 50 (describing global pressures towards greater transparency in state decision-making); Mathews, *supra* note 28, at 10 ("Revolutionary developments in computer and telecommunications technologies have broken the monopoly governments used to hold on collecting, managing and using large amounts of information and have eroded the deference governments enjoyed because of that greater knowledge."); see also DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* (1998) (calling for an end to secrecy in all governmental decision-making).

¹²⁸ In other words, if one conceives of terrorism as crime and the response as law enforcement (bracketing the phenomenon of state-sponsored terrorism), see *supra* text accompanying notes 51–60, judicial restraint emerges as inappropriate. Of course, secrecy and dispatch are important in dealing with terrorism, but insofar as courts are involved only in the prosecution of terrorism, any need for secrecy can be addressed in the same way that, for instance, it is addressed in the organized crime context.

¹²⁹ See KOH, *supra* note 15, at 222 (noting that insofar as the embarrassment rationale for the political question doctrine "rests on foreign confusion, it denigrates our allies' intelligence and assumes that they cannot comprehend a constitutional system of shared powers"); Eyal Benvenisti, *Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on 'The Activities of National Courts and the International Relations of Their State'*, 5 EUR. J. INT'L L. 423, 437 (1994) (observing that "the risk of the forum State being embarrassed by a decision is negligible, and the executive actually may prefer judicial intervention that relieves it from the necessity to make a politically difficult choice").

¹³⁰ See, e.g., *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998) (seeking reversal of a death sentence imposed on a Paraguayan national whose rights under consular convention had

Such participation, and the willingness of courts to reject foreign government positions,¹³² should mark the end of the political question doctrine in foreign relations law cases. In this context, judicial pronouncements that may trouble other countries are nothing to be embarrassed about; those pronouncements simply become another factor in the increasingly layered dynamic of international relations. Indeed, the disaggregation of the state poses the possibility of disaggregated alliances, so that foreign ministries might cooperate to confront independent judicial agendas. Other governments do not hold U.S. diplomatic representatives responsible for judicial decision-making;¹³³ rather, they try to reverse through political channels those

been violated by state law enforcement authorities); *Estados Unidos Mexicanos v. DeCoster*, 59 F. Supp. 2d 120 (D. Me. 1999) (deciding a suit by Mexico in *parens patriae* for Mexican nationals claiming unlawful employment practices). Courts are now entertaining a raft of claims brought by several countries and subnational jurisdictions against American cigarette companies. See generally *Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc.*, 103 F. Supp. 2d 134 (N.D.N.Y. 2000); *State of Sao Paulo of the Federative Republic of Brazil v. Am. Tobacco Co.*, No. 00-0922, 2000 U.S. Dist. LEXIS 9617 (E.D. La. May 26, 2000); *Republic of Bolivia v. Philip Morris Cos.*, 39 F. Supp. 2d 1008 (S.D. Tex. 1999); *Republic of Panama v. Am. Tobacco Co.*, No. 98-3279, 1999 U.S. Dist. LEXIS 8135 (E.D. La. May 28, 1999); see also *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994) (deciding a claim for environmental injuries brought by, among others, an Ecuadoran "quasi-municipality").

¹³¹ Amicus participation by foreign governments is becoming routine. See Stephen A. Plass, *The Foreign Amici Dilemma*, 1995 BYU L. REV. 1189 (describing amici participation by foreign governments); see also, e.g., *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522 (1987) (including Germany as amicus in a case involving the taking of evidence abroad); *Inland Steel Bar Co. v. United States*, 155 F.3d 1370 (Fed. Cir. 1998) (including the United Kingdom as amicus in a case involving a trade subsidy); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (including Japan as amicus in an antitrust case); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999) (including Germany and Poland as amici in a case involving Holocaust-related claims against foreign corporations); *Potabe v. Robichaux*, No. 99-1132, 1999 U.S. Dist. LEXIS 9798 (E.D. La. June 25, 1999) (involving Papua New Guinea as intervenor); *Grynberg Prod. Corp. v. British Gas, P.L.C.*, 817 F. Supp. 1338, 1357 (E.D. Tex. 1993) (noting communication to the court from Republic of Kazakhstan in a case involving mineral rights in Kazakhstan).

¹³² See, e.g., *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 324 & n.22 (1994) (noting and rejecting arguments by several foreign government amici); *Marathon Oil Co. v. Ruhrgas A.G.*, 115 F.3d 315, 320 (5th Cir. 1997) (rejecting German government position on removal issue).

¹³³ The first judicial recognition of this development is found in recent consideration of foreign country tobacco litigation. Defendants in those cases sought removal to federal courts for, among other reasons, the possibility of divergent results in different state courts, with detrimental effects on foreign relations with loser countries. See *In re Tobacco/Governmental Health Care Costs Litig.*, 100 F. Supp. 2d 31, 37 (D.D.C. 2000) ("[T]he removing defendants hypothesize that a favorable decision for Bolivia in a Texas state court that is contrary to an unfavorable decision for Venezuela in a Florida state court may appear inequitable to Venezuela and adversely affect our foreign relations with that country."). To this argument the court appropriately responded:

If the removing defendant's hypothetical came to pass, however, Venezuela would be under

decisions contrary to their interests, in rather the way that a domestic party will often turn to political institutions after defeat in court.¹³⁴ The downside to allowing judicial consideration of foreign relations controversies is thus further minimized; no longer will judicial participation pose much of a risk of destabilizing international relations.

In short, where the political question doctrine was once defensible, even demanded, by the international context, its functional virtues have dissipated. It is still deployed in the context of disputes with states whose understanding of the U.S. system may be limited (and who might therefore hold the nation responsible for perceived judicial slight),¹³⁵ as well as a narrowing class of cases that present old-world justifications for judicial restraint.¹³⁶ But one can in globalization's wake safely

no illusion that the United States government chose to treat it inequitably. Instead, as a sophisticated participant in our judicial system—who itself chose to litigate in state court, and persists in its desire to do so—Venezuela should understand that the differing outcomes of the cases are a result of the fora in which the different foreign sovereign plaintiffs chose to bring their cases.

Id. at 37–38.

¹³⁴ For instance, after its view on extraterritorial abduction was rejected by the Supreme Court in the *Alvarez-Machain* litigation, the government of Mexico secured an amendment of its extradition treaty with the United States expressly to prohibit such conduct. *See* *United States v. Alvarez-Machain*, 504 U.S. 655, 670 (1992) (interpreting extradition treaty not to prohibit extraterritorial abduction of a Mexican citizen from Mexican territory by U.S. drug enforcement agents, with Mexico participating as amicus); Steven A. Holmes, *U.S. Gives Mexico Abduction Pledge*, N.Y. TIMES, June 22, 1993, at A11 (describing how in the wake of the *Alvarez* decision the Mexican government secured assurances against future cross-territorial abductions).

¹³⁵ *See, e.g.*, *Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152, 159–62 (2d Cir. 2000) (rejecting, on political question grounds, a suit against successor states to Yugoslavia for payment of debt incurred by it); *Can v. United States*, 14 F.3d 160, 165 (2d Cir. 1994) (rejecting a claim by former Vietnamese citizens to property of the Vietnamese government frozen under Trading with the Enemy Act); *see also* Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1917–27 (1992) (proposing a model of transnational legal relations where courts would entertain disputes relating to democratic states, but not undemocratic ones).

¹³⁶ The old-world justifications include, for instance, issues involving the recognition of foreign states. *See, e.g.*, *Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d 1142, 1147 (9th Cir. 1999) (declining to review an executive branch determination that Taiwan was not bound by China's adherence to the Warsaw Convention). The doctrine has also figured in the refusal by some courts to entertain claims relating to the World War II era, which might be explained (the sophistication of the interested governments notwithstanding) as a valid trans-historical application of the doctrine. *See, e.g.*, *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999) (finding no jurisdiction on political question grounds over claims relating to forced labor during WWII in plants operated by Ford's German subsidiary). But the classic applications of the doctrine to issues such as the control of territory and the recognition of foreign states are themselves largely old-world controversies, which poses the possibility of the doctrine withering away, rather than being reversed outright, along with the context in which it flourished. In the meantime, one can expect continued resort to the doctrine as a sort of doctrinal hangover, even where other grounds would suffice to reach the same result. *See, e.g.*, *Kwan v. United States*,

predict greater judicial involvement in cases involving foreign relations.¹³⁷ Also consistent with this analysis (and unexplained by those commentators who have attacked it in the past) was the persistence of judicial non-review in the days before globalization. It is only by considering the historical contingency of the doctrine that one can rationalize its former durability and likely erosion.

B. Federal Primacy Over Foreign Relations

One finds much the same story with respect to the constitutional bar on state activity affecting foreign relations, another differential rule of foreign relations law once dictated by the international context, but now contestable in the wake of globalization. It, too, reversed a constitutional presumption, in this case that the states play a critical role in our system of federalism. That reversal can be explained by the same twin concerns behind the political question doctrine: that the high stakes of international relations make intolerable any added risks of destabilization, and that state action presents such a risk because the nation would be held responsible for the misjudgments of its subunits. With globalization, however, these concerns have dissipated, and so has the rationale for the rule. The states and other subfederal actors should no longer suffer any constitutional bar from foreign policy-making activities.

The principle of federal primacy has been an entrenched one, with a pedigree stretching back to the Founding.¹³⁸ It was reflected in the textual prohibitions of

84 F. Supp. 2d 613, 624 (E.D. Pa. 2000) (rejecting a claim to disability payments under a U.S.-Korean agreement on both standing and political question grounds).

¹³⁷ One can now contemplate, as suggested above, judicial participation regarding the use of force. This would be especially true of backward-looking controversies not directly implicating the interests of other states, as in the case of damage claims against the U.S. government. *See* *Koohi v. United States*, 976 F.2d 1328, 1331, 1337 (9th Cir. 1992) (rejecting application of the political question doctrine to a damages suit relating to the accidental U.S. downing of an Iranian passenger jet, though denying the claim on the merits). *But see* *Aktepe v. United States*, 105 F.3d 1400, 1401 (11th Cir. 1997) (denying review on political question grounds of a negligence suit by members of the crew of a Turkish destroyer accidentally attacked by a U.S. naval vessel). More importantly, it might also be possible with respect to core decisions regarding the use of force. Consider the Kosovo operation. The stakes were fairly high, but nowhere near those of a Korea or Vietnam (never mind the World Wars) in terms of security interests and military vulnerabilities. I think the courts could have insinuated themselves into the decision-making process without undue risk. One can even imagine the courts ordering a halt to operations such as the Kosovo campaign (and that order being respected by the President). There are signs that the courts are in fact moving away from the political question doctrine as it applies to the use of force abroad, although other jurisdictional doctrines have to date kept them from the merits. *See, e.g.,* *Campbell v. Clinton*, 203 F.3d 19, 19 (D.C. Cir. 2000) (rejecting on standing grounds a war powers claim brought by a congressman challenging the legality of the Kosovo campaign); *Dellums v. Bush*, 752 F. Supp. 1141, 1152 (D.D.C. 1990) (rejecting on ripeness grounds a request to enjoin military operations against Iraq in the absence of congressional authorization).

¹³⁸ *See* *Spiro*, *supra* note 14, at 1228–41; *see also* *Swaine*, *supra* note 18, at 1212 n.308

Article I, section 10, which barred the states from engaging in war, imposing duties on imports, and entering into treaties or alliances.¹³⁹ A string of nineteenth-century decisions from the Supreme Court progressively excluded the states from other internationally-oriented powers, including extradition,¹⁴⁰ foreign commerce,¹⁴¹ and immigration.¹⁴² The Compact Clause was generally interpreted to bar state authorities from so much as communicating with foreign governments.¹⁴³ The federal government was, in effect, extended a dormant power over foreign relations, excluding the states from policy-making even in the absence of federal action. The first half of the twentieth-century, meanwhile, expanded affirmative federal powers to trump state law in the area.¹⁴⁴ Decisions upholding the assertion of such powers were dismissive of any role for the states on the international plane.¹⁴⁵

(highlighting early twentieth-century evidence of the norm against state interference in foreign relations). *But see* Goldsmith, *Federalism*, *supra* note 16, at 1649 (arguing that no rule against state foreign policy-making prevailed before the *Zschernig* decision).

¹³⁹ See U.S. CONST. art. I, § 10, cl. 1–3.

¹⁴⁰ See *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 561–79 (1840) (opinion of Taney, J.) (disapproving a state attempt to undertake international extradition). Although *Holmes* involved an evenly divided Court, the Taney position was later approved in dicta and in a leading nineteenth-century treatise on the subject. See *United States v. Rauscher*, 119 U.S. 407, 414 (1886); 1 JOHN BASSETT MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 53 (1891).

¹⁴¹ See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 435 (1827) (extending the reach of the dormant domestic Commerce Clause to the foreign Commerce Clause).

¹⁴² See *Chy Lung v. Freeman*, 92 U.S. 275, 280–81 (1875) (striking down a California law empowering a state official to deny admission to various classes of undesirable aliens, including paupers and prostitutes).

¹⁴³ See *Holmes*, 39 U.S. (14 Pet.) at 560 (reversing an attempted extradition of defendant by the State of Vermont to Canada on the ground that action would violate the Compact Clause restriction on state communications with foreign governments); *see also* Political Subdivisions, 5 Hackworth DIGEST § 527, at 596 (describing the 1908 State Department denial of a German government request to deal directly with the State of Georgia regarding defaulted state bonds); Spiro, *supra* note 14, at 1231 & nn.41–42; Swaine, *supra* note 18, at 1224–30.

¹⁴⁴ Most notably expanded by confirming the preemptive effect of treaties and other international agreements on state law. See *United States v. Pink*, 315 U.S. 203, 233–34 (1942) (finding an executive agreement to trump state law); *United States v. Belmont*, 301 U.S. 324, 331–32 (1937) (same); *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (finding the treaty power to extend to all matters of international concern). The Court also expansively framed the preemptive effect of federal legislation in the foreign affairs context. See *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941) (striking down a Pennsylvania statute requiring registration of aliens, notwithstanding the absence of conflict with a similar federal registration requirement). One can of course frame these affirmative powers as another example of the foreign relations differential, insofar as they stand for the proposition that the authorities of the federal government are greater in the foreign affairs context than in the domestic one.

¹⁴⁵ See, e.g., *United States v. Belmont*, 301 U.S. 324, 331 (1937) (“In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.”); *see also* *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316 (1936) (“[T]he states severally never possessed

A trio of Cold War-era decisions marked the high point of federal exclusivity over foreign relations. The Court in *Banco Nacional de Cuba v. Sabbatino*¹⁴⁶ found customary international law to fall into the exceptional category of federal common law, in derogation of the rule of *Erie Railroad Co. v. Tompkins*;¹⁴⁷ and the interpretation of international law was thereafter assumed the exclusive province of federal courts.¹⁴⁸ In the Foreign Commerce Clause context, *Japan Line, Ltd. v. County of Los Angeles*¹⁴⁹ reinforced the strict ouster of states from economic regulation implicating foreign countries, even where such regulation would be considered “de minimis” in the domestic context.¹⁵⁰ Finally, and most notably, in striking down a state probate measure discriminating against residents of East Bloc nations, the Court in *Zschernig v. Miller*¹⁵¹ deemed unconstitutional all state activity having “more than ‘some incidental or indirect effect’”¹⁵² on foreign relations.¹⁵³

These decisions and the differential rule they supported were plainly driven by international exigencies. In confirming the primacy of federal power in this sphere, the Court has often adverted to the momentous and sensitive nature of foreign

international powers.”); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) (“For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”).

¹⁴⁶ 376 U.S. 398 (1964).

¹⁴⁷ 304 U.S. 64 (1938).

¹⁴⁸ See RESTATEMENT (THIRD), *supra* note 16, § 111 n.3, at 50 (1987) (noting that “implications of *Sabbatino*” support the position that customary international law is part of federal common law).

¹⁴⁹ 441 U.S. 434 (1979).

¹⁵⁰ *Id.* at 455–56.

¹⁵¹ 389 U.S. 429 (1968).

¹⁵² *Id.* at 434.

¹⁵³ It is important to note that the dormant foreign relations power has never been a categorical exclusion from activity involving all matters international, but rather a bar on state-level activity having an effect on national foreign relations. Jack Goldsmith so characterizes the current doctrine, see Goldsmith, *New Formalism*, *supra* note 16, at 1406–08 (asserting that adoption of the “effects” test was an important innovation of *Zschernig*), though I think it explains prohibitions on the states going back to those found in the Constitution; here I disagree with Ernie Young’s argument that the rule suffers the same flaws as dual federalism by attempting to divide the actually inseparable domestic and foreign. See Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139 (2001). (In this respect the tendency to frame the doctrine as one enshrining “exclusive” federal power, though useful shorthand, does suffer a significant drawback.) The potential of such effects does result in categorical exclusion from certain kinds of foreign policy related activity. Some of these prohibited activities have always been clear, such as the prohibition on war-making by the states. Some have shifted with time, such as the once-strict bar on communications by state officials with foreign government authorities, largely as a result of shifts in the international context. Now-pervasive trade missions by state and local officials are a good example of an international activity that (at least today) would pose no problem under the effects test, even though it is obviously international.

relations¹⁵⁴ and the dangers of involvement on the part of state authorities.¹⁵⁵ The critical exogenous link is again found in the notion of state responsibility, that is, the legal construction of the international system in which nations have been held responsible for the conduct of their component parts, including such subunit governments as the states of the Union.¹⁵⁶ The concern that the United States as a nation would be held responsible by the international community for the misconduct of state authorities has echoed as a rationale for the exclusivity principle, among the Framers,¹⁵⁷ in the nineteenth¹⁵⁸ and early twentieth¹⁵⁹ centuries, and through the Cold

¹⁵⁴ See, e.g., *Japan Line*, 441 U.S. at 456 (noting that even "slight" overlapping of state and federal taxes "assumes importance when sensitive matters of foreign relations and national sovereignty are concerned").

¹⁵⁵ See, e.g., *Zschernig*, 389 U.S. at 441 (finding that application of state probate law could result in international controversies, "illustrat[ing] the dangers which are involved if each State . . . is permitted to establish its own foreign policy"); *United States v. Pink*, 315 U.S. 203, 232 (1942) ("If state action could defeat or alter our foreign policy, serious consequences might ensue."); *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941) (striking down state alien registration measures on field preemption grounds, observing that mistreatment of aliens by states could lead to "international controversies of the gravest moment"); see also *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 574 (1840) (justifying expansive interpretation of the Compact Clause on grounds that communication by states with foreign sovereigns would be "dangerous to the Union").

¹⁵⁶ See sources cited *supra* note 64.

¹⁵⁷ See, e.g., 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., 1911) (recording Madison's concerns regarding state violations of treaties and of the law of nations; "It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring [calamities] on the whole."); THE FEDERALIST NO. 80, at 446 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("[T]he peace of the WHOLE, ought not to be left at the disposal of a PART. The union will undoubtedly be answerable to foreign powers for the conduct of its members.").

¹⁵⁸ Perhaps most clearly in *Chy Lung v. Freeman*, in which Justice Miller contemplated enforcement of a state immigration measure provoking a claim from foreign nation:

Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the Federal government? If that government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?

The Constitution of the United States is no such instrument.

Chy Lung, 92 U.S. at 279–80. The state law, Miller observed, would otherwise allow a "silly, an obstinate, or a wicked commissioner [to] bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend." *Id.* at 279; see also *The Passenger Cases*, 48 U.S. (1 How.) 282, 408 (1849) (opinion of McLean, J.) ("The general government only

War-era cases.¹⁶⁰ Here, as with the political question doctrine, the need to “speak with one voice” has assumed almost mantric proportions.¹⁶¹

Against the backdrop of fragile and dangerous international relationships, and the doctrine of state responsibility, the rule against state-level foreign policy-making emerged as not only prudent, but also potentially important to the survival of the nation. More so than federal courts—which are, after all, part of the federal government, and whose judgments ultimately require the acquiescence of other federal officials—state governments, to the extent they are unconstrained, are as a structural matter likely to engage in conduct violating international norms and obligations. At least in the past, state authorities have been blinded in their view of international controversies, eager to satisfy local constituencies at the same time that they faced no consequences from such action, and facing no incentive to comprehend those consequences or more generally secure an expertise in international affairs.¹⁶²

is known in our foreign intercourse.”); *id.* at 450 (opinion of Catron, J.) (“[A]ll power to treat, or have foreign intercourse, was surrendered by the States This became ‘the nation’ known to foreign governments, and was solely responsible to them for the acts of all the States and their inhabitants.”); *Brown v. Maryland*, 25 U.S. (1 Wheat.) 419, 447 (1827) (“What answer would the United States give to the complaints and just reproaches to which [state regulation of foreign commerce] would expose them?”); *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1, 228–29 (1824) (Johnson, J., concurring) (“The States are unknown to foreign nations Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be held responsible for them”); S. Doc. No. 54–56, at 5 (1897) (“[A] State of the Union, although having admittedly no power whatever in foreign relations, may take action uncontrollable by the Federal Government, and which, if not properly a *casus belli*, might nevertheless as a practical matter afford to some foreign country the excuse for a declaration of war.”); *cf.* *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (“The only government of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States.”).

¹⁵⁹ See, e.g., *Pink*, 315 U.S. at 232 (declaring that if states were allowed to interfere with foreign policy, “[t]he nation as a whole would be held to answer if a State created difficulties with a foreign power”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 317 (1936) (“Considering [the states] as political beings, they were dumb, for they could not speak to any foreign sovereign whatever. They were deaf, for they could not hear any propositions from such sovereign.”).

¹⁶⁰ See, e.g., *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 450 (1979) (stressing the danger that state tax on international instrumentalities could provoke the retaliation of foreign nations, which “retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer”); *id.* at 453 (“The risk of retaliation by Japan, under these circumstances, is acute, and such retaliation of necessity would be felt by the Nation as a whole.”).

¹⁶¹ See, e.g., *id.* at 449; *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) (“[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments”); *La. Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, 819 (5th Cir. 1990) (“[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments.”).

¹⁶² See, e.g., *Bilder*, *supra* note 15, at 828 (highlighting lack of expertise as one basis for the

These tendencies spring from the notion of state responsibility. A Michigan or North Carolina that targeted a cheap export country (at the behest of a local producer) would shoulder no necessary consequence of that action, insofar as retaliation would be directed against the United States as a whole. The structural incentives for state-level action are apparent in those episodes in which subfederal actors have worked to defy the exclusivity principle.¹⁶³ Combined with the traditionally fragile characteristics of international relations, these incentives also have justified the rule and its imposition as a dormant power,¹⁶⁴ even though it reverses usual constitutional presumptions.

rule of state exclusion). In this respect, again, one finds a clear parallel to the withdrawal of the courts from foreign policy-making under guise of the political question doctrine. *See supra* notes 111–14 and accompanying text. This assumption regarding the capacities of state officials was, of course, itself a product of an old world in which state and local officials did not need such expertise in order to satisfy their responsibilities.

¹⁶³ These have often involved state-level enactments reflecting dominant racist sentiments, without heed to the international consequence of such measures. The antebellum Negro Seaman Acts present a prominent example. These measures, providing for the detention of black sailors regardless of nationality in several southern states, provoked a serious diplomatic dispute with the United Kingdom. *See Spiro, supra* note 14, at 1234–36. The state tax context offers a less problematic example in which state incentives will be to garner maximum receipts, regardless of the international consequences (so long, of course, as the taxes do not result in relocation of foreign business).

¹⁶⁴ Recent commentators arguing against the rule have focused their attack on the dormant element, insisting that any danger posed by state-level action can be corrected by affirmative action of the political branches and the normal rules of preemption. *See Goldsmith, Federalism, supra* note 16, at 1681–83 (arguing that Congress will effectively monitor and address problematic state activity); Young, *supra* note 153, at 172 (arguing that any difficulty in securing political action presents “precisely the sort of political and structural impediments to federal preemption that courts must respect”). *But see* Swaine, *supra* note 18, at 1247 (concluding that “there is cause to be skeptical that Congress presents a sufficient alternative” to the judiciary in policing federal prerogatives in the area). While I agree that today such powers present an adequate (though perhaps unnecessary) safeguard, that is only by virtue of globalization. In the old-world construct, there were two basic reasons why a dormant power was mandated. First, the stakes were such that one could not afford to take the hit posed by the initial state-level action, even if in theory it could be remedied and prevented thereafter. Lacking refined dispute resolution mechanisms, the old international system was one in which an initial injury could spark a conflict that would quickly spiral out of control. Second, domestic political realities were such that the political branches could hardly be expected to police their institutional prerogatives. The state whose conduct was at issue would represent an intense interest in defense of the action, even where it might represent a harm to the nation as a whole; any foreign interests involved would have little voice in that domestic process. Globalization has dissipated these features of the old system, eliminating the need for a dormant power. First, as repeatedly emphasized above, the world today is not a tinderbox in which a single spark can result in maximum damage. Any offense caused by state-level action can be settled by institutionally regularized means. Second, disaggregation and economic globalization correct the political imbalances that once protected state-level action from affirmative preemption. Today, foreign interests are directly advanced at all political levels. For instance, foreign officials now routinely work on the Hill, where in the past such activity would have presented a breach of

But that presumption should be resurrected in the face of globalization. Foreign relations continue to comprehend important interests, but the institutionalization of multilateral trade and security regimes has greatly reduced the danger that state-level misconduct will initiate controversies that subsequently spiral out of control. There are now too many brakes on what might otherwise be catastrophic sequences; in this respect, international relations are less sensitive, and the downside risks less dramatic than they once were.

Disaggregation and the probability that it will undermine conceptions of state responsibility presents an equally powerful rationale for abandoning the rule. International actors increasingly recognize political subdivisions as autonomous actors within spheres of exclusive authority; they understand that a Massachusetts or a Texas may have the last word on some matters. This understanding comes with a greater understanding of our federal system; it also comes with greatly increased direct contacts, especially on economic and commercial matters, between states and foreign governments.¹⁶⁵ It almost goes without saying that such contacts are facilitated by improved communications. When foreign nations have a problem with a state-level policy, it is now routinely a part of the response to go to the source, with diplomatic and other initiatives targeted at responsible subfederal actors.¹⁶⁶ The American system

protocol if not also a possible constitutional trespass on presidential powers. *See infra* note 305 and accompanying text. Perhaps more importantly, global economic integration has made it likely that when "foreign" entities oppose some measure, "domestic" ones will as well. *See infra* text accompanying notes 329–32 (noting the increasing non-distinction of national boundaries). This was apparent with respect to the Massachusetts Burma law, where the politically powerful National Foreign Trade Council succeeded in blocking congressional approval of such state measures. In any case, however, it is only the globalization thesis that explains why the dormant power was once necessary but no longer is.

¹⁶⁵ As of 1999, for example, forty-one U.S. states maintained 240 offices in thirty-four foreign countries. *See* Dave Naftzger, *The States' Role (if any) in Foreign Affairs*, STATE LEGISLATURES, Dec. 2000, at 24, 25. In 1993, governors from twenty-seven states and territories undertook eighty-one trips abroad for "economic development purposes." FRY, *supra* note 71, at 69.

¹⁶⁶ *See, e.g.,* Ronan Doherty, Note, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281, 1326–27 (1996) (citing examples); Raymond Bonner, *Mexican Killer is Refused Clemency*, N.Y. TIMES, July 21, 2001, at A8 (describing communications between the Governor of Oklahoma and the President of Mexico regarding execution of a Mexican national); Spencer S. Hsu & Peter Finn, *Allies of Inmate Push to Prevent Execution*, WASH. POST, July 22, 1997, at E1 (reporting pleas for clemency to the Governor of Virginia from the President of Italy and the Mayor of Palermo regarding Joseph O'Dell). Foreign countries have also made direct approaches to subfederal authorities with regard to other difficulties involving treatment of their nationals in the United States. *See, e.g.,* Doherty, *supra*, at 1330 n.223 (describing the visit of a "high-level" Swedish government delegation to California to discuss request that a Swedish citizen in a California jail be allowed to serve out time in Sweden under prisoner transfer treaty); *id.* at 1339 (describing a meeting of Japanese officials with the Governor of Louisiana regarding the investigation of the murder of a Japanese exchange student in Baton Rouge); *see also* Steven Greenhouse, *Greengrocers to Pay \$315,000 in Back Wages*, N.Y. TIMES, Nov. 21, 2001, at D3 (describing

of federalism is in this respect hardly opaque to international actors.

Query whether at least some international actors have long enjoyed this understanding of the federal system and have even composed entreaties to subfederal officials (though never without controversy).¹⁶⁷ On this score, economic globalization supplies a crucial additional ingredient. The dependence of the states on global sources of investment and exports gives international actors a consistent tool by which to discipline them concretely and directly. This is something new. In the past, even if a foreign state understood that subnational authorities bore responsibility for a particular practice or instance of misconduct, there was little it could do with that information, for the foreign state would in most cases have no discrete leverage over the offending jurisdiction.¹⁶⁸ In that context, state (that is, national) responsibility made sense, insofar as the nation presented the only practicable platform against which to enforce international norms. But that proposition falls in the face of economic globalization. International actors will now almost always enjoy channels through which to retaliate more or less cleanly against a particular subnational jurisdiction, by redirecting their economic activity elsewhere, usually at minimal cost.¹⁶⁹ The efficacy of targeted retaliation has already been demonstrated,¹⁷⁰ and

cooperation between the Mexican government and the New York State Attorney General in bringing suit regarding working conditions of Mexican immigrants).

¹⁶⁷ The posture of Great Britain with respect to the Negro Seaman Acts, *see supra* note 163, presents a good historical example in which an offended foreign sovereign understood that actual political authority in the controversy rested mostly in state capitals. *See Spiro, supra* note 14, at 1234–36. One could well suppose that European states at least in fact enjoyed a sufficient sophistication of American governance to know when and how state-level authorities were implicated on matters involving their interests.

¹⁶⁸ This fact also diminished the incentive foreign states would have had to develop a more sophisticated understanding of particular subnational entities and supports the general proposition that knowledge of the internal federalism dynamic was surely more primitive in the old world than it is today.

¹⁶⁹ This cost is reduced at the subnational level insofar as the availability of substitutes is multiplied; it is often cheaper to replace a Texas with a Tennessee than to replace the United States with a Mexico. *See infra* notes 297–300 and accompanying text. There may also now exist possibilities for shaming subnational actors where they are responsible for violations of international norms. *See infra* notes 310–14 and accompanying text (suggesting shaming possibilities with respect to disaggregated institutions of central government).

¹⁷⁰ This has been demonstrated perhaps most notably in the efforts of several countries to win repeal of so-called unitary tax methods adopted by several states in the 1980s that were unfavorable to multinational corporations. As part of those efforts, the British Parliament enacted legislation authorizing revocation of certain tax credits for U.S. corporations headquartered in states adhering to the objectionable approach. *See Finance Act 1985*, c. 1, § 54 & sched. 13, para. 5 (Eng.). Several Japanese corporations declined to locate new production facilities in such states, expressly citing the tax scheme as the deciding factor. *See HOCKING, supra* note 71, at 148–50. These efforts on the part of foreign actors “were a key part of the process in whereby the unitary tax issue was transformed in the minds of state politicians,” *id.* at 149, and were critical to the eventual repeal of the tax scheme in all states that had employed it. Indeed, several states agreed to

there may be other examples just over the horizon.¹⁷¹

abandon the unitary tax as part of quid-pro-quo deals with Japan. Timothy C. Blank, *Significant Development: A Proposed Application of the Compact Clause*, 66 B.U. L. REV. 1067, 1073–75, 1080–85 (1986) (describing agreements signed between Indiana, Oregon, and Florida with Japanese corporations providing for the repeal of unitary taxation in return for promises of investment). Eventual litigation before the Supreme Court regarding California's tax occurred after repeal, involving only the matter of refund for taxes previously paid.

Among other examples of targeted retaliation is Japanese action against Texas-based banks in response to a Texas prohibition on foreign bank branches. JOHN M. KLINE, *STATE GOVERNMENT INFLUENCE IN U.S. INTERNATIONAL ECONOMIC POLICY* 179 (1983). There are other unperfected examples. In the wake of California's 1994 adoption of Proposition 187 (which would have made undocumented aliens ineligible for most public benefits, including public primary and secondary education), Mexico made thinly veiled threats of relocating business to other states. Although the ballot measure never went into force, relations between Mexico and California nonetheless suffered dramatically. Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121, 165–66 (1994) (describing the response of Mexican officials and executives to Proposition 187). Similarly, during the dispute over a Massachusetts restricting procurement from corporations doing business in Burma, there were suggestions by Japanese officials that the measure could result in diminished investment in the state. There were also suggestions that any sanctions authorized by the World Trade Organization against the United States be targeted against Massachusetts entities. Gordon Fairclough, *Massachusetts Trade Law Is Challenged*, WALL ST. J., July 25, 1997, at B17; Michael Grunwald, *Mass. Law Targeting Burmese Junta Could Spark Trade War with Japan*, BOSTON GLOBE, Jan. 31, 1997, at A1.

One also finds support for the concept of targeted retaliation in the domestic context, as when the State of Arizona bowed to a tourism and convention boycott against its failure to adopt Martin Luther King Jr.'s birthday as a state holiday. Jane Gross, *Arizona Hopes Holiday for King Will Mend Its Image*, N.Y. TIMES, Jan. 17, 1993, § 1, at 16; see also David Firestone, *Battle Flag is Lowered, But War Isn't Quite Over*, N.Y. TIMES, July 2, 2000, § 1, at 10 (describing redesign of state flag containing confederate stars and bars, in face of tourism boycott launched by NAACP).

¹⁷¹ The most notable example is the imposition of the death penalty on juvenile offenders, a practice inconsistent with increasingly clear international norms. See Bruce Shapiro, *Dead Reckoning*, THE NATION, Aug. 6, 2001, at 14 (describing consideration of a campaign among European investors who oppose the death penalty to target investment away from death penalty states); *Letter Regarding the Death Penalty from the Chairman of the European Parliament's Delegation for Relations to Governor George Bush*, PR NEWswire, June 25, 1998, LEXIS, Nexis Library, News Group File (observing that "[m]any companies, under pressure from shareholders and public opinion to apply ethical business practices, are beginning to consider the possibility of restricting investment in the U.S. to states that do not apply the death penalty"); see also Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 574 (1997) (describing international law regarding juvenile death penalty); Steven A. Drizin & Stephen K. Harper, *Old Enough to Kill, Old Enough to Die*, S.F. CHRON., Apr. 16, 2000, at Z1 (describing increasing probability of economic pressure against states that undertake the execution of offenders). Jack Goldsmith and others have questioned this theory of targeted retaliation on the grounds that it is empirically unproven. See Goldsmith, *Federalism*, *supra* note 16, at 1679 n.253; Swaine, *supra* note 18, at 1240–42 ("Although cases of targeted retaliation are not unknown, it is hard to find examples demonstrating its sufficiency."). To take the objection on its own terms, every major controversy provoked by state-level action over the last decade has at least suggested

This strand of disaggregation further reduces the risks of state action both by limiting the consequences of state-level misjudgment and by reducing the incentives for states to commit such errors in the first place. To the extent that Massachusetts shoulders the consequences of its international activity, the rest of us have no great reason to suppress that activity, which presumably reflected some preference on the part of the people of Massachusetts. Of course, to the extent that Massachusetts is forced to shoulder those consequences, it may desist from the action in the first place.

There is some evidence that the courts are softening the default rule against state involvement in foreign policy-making. In *Barclays Bank PLC v. Franchise Tax Board*,¹⁷² the Supreme Court upheld the constitutionality of a state tax that had drawn vigorous protests from foreign governments.¹⁷³ The decision appears unprecedented insofar as the state measure at issue had shown more than the mere potential to interfere with the nation's foreign relations, and commentators have highlighted its break with the one-voice tradition.¹⁷⁴ Although the Court's more recent decision in *Crosby v. National Foreign Trade Council*¹⁷⁵ is consistent with the exclusivity principle—the decision struck down a state procurement restriction from companies doing business in Burma—the ruling was narrowly framed as a preemption case, and refused to pass on the continued viability of the *Zschemig* and *Japan Line* precedents.¹⁷⁶ *Crosby* applied the same preemption analysis as in the domestic context;¹⁷⁷ in other words, it acknowledged no foreign relations differential, at least

the possibility of a direct response against the offending state. And the objection does not undermine the logic of targeted retaliation, nor the potential for its deployment in the face of globalization. Even though Goldsmith agrees that the dormant foreign affairs power should be abandoned, he would find it difficult to buy into any such globalization thesis to the extent it is inconsistent with a submerged anti-internationalist premise. As Judith Resnik puts it in criticizing recent federalism jurisprudence from the Supreme Court, the trend toward limiting federal power “reveals yet another function of categorical federalism—its role in attempting to buffer the United States from the effects of lawmaking beyond its borders.” Resnik, *supra* note 7, at 657.

¹⁷² 512 U.S. 298 (1994).

¹⁷³ *Id.* at 324 n.22 (noting that “[t]he governments of many of our trading partners have expressed their strong disapproval of California’s method of taxation”).

¹⁷⁴ See, e.g., Bradley & Goldsmith, *Critique*, *supra* note 16, at 866; Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 212 (2001) (“Many believe that [*Barclays*] *Bank* marks the end of all dormant foreign affairs preemption doctrines.”).

¹⁷⁵ 530 U.S. 363 (2000).

¹⁷⁶ *Crosby* is attracting an array of academic commentary. See Sarah H. Cleveland, *Crosby and the “One-Voice” Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975 (2001); Goldsmith, *supra* note 174; Daniel Halberstam, *The Foreign Relations of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015 (2001); Sanford Levinson, *Compelling Collaboration with Evil? A Comment on Crosby v. National Foreign Trade Council*, 69 FORDHAM L. REV. 2189 (2001); Edward T. Swaine, *Crosby As Foreign Relations Law*, 41 VA. J. INT’L L. 481 (2001); Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11 (2000); Young, *supra* note 153.

¹⁷⁷ See 530 U.S. at 374 n.8 (declining to consider so-called “field” preemption, dormant foreign commerce, and foreign affairs power arguments).

not as a matter of formal analysis.¹⁷⁸ Because it deployed a preemption rationale, it could in effect be overruled by subsequent congressional action (with respect to Burma as well as future sanctions regimes),¹⁷⁹ which would itself evidence a change in constitutional norms.¹⁸⁰

In short, *Crosby* may well emerge as a transitional case on the way to a more permissive doctrinal regime for state foreign policy-making, as evidenced by other developments. There can be little doubt that the states will become even more active in the international arena; in the wake of disaggregation, that activity poses a diminishing threat. It is sometimes overlooked that the rule against state foreign policy-making itself involves costs, in the form of suppressed state-level preferences. That makes the case for permitting, even embracing, state action at the international level more compelling.¹⁸¹ Of course, there will be episodes in which the states

¹⁷⁸ Both Ernie Young and Ed Swaine (though working from opposite sympathies) make a good case that the preemption test in *Crosby* was more expansive than that exacted in the domestic context, and that one can in fact still detect a differential, the Court's protestations notwithstanding. See Swaine, *supra* note 176, at 483 (suggesting that the *Crosby* opinion "displays a constitutionally-premised sensitivity to international comity, and to the President's foreign relations powers"); Young, *supra* note 153, at 170 (asserting that the *Crosby* opinion "reflected strong exceptionalist influences"). But of course it remains the case that the analysis was framed as garden-variety preemption, to which characterization the Court might become true in future cases, while jettisoning the dormant powers doctrine altogether. *Barclays Bank* would seem to point the way. In this respect, however, *Crosby* is a transitional case, one likely not to establish a durable resolution of the issue.

¹⁷⁹ I think this unlikely with respect to the Burma laws themselves, for all the standard reasons that make the passage of freestanding legislation difficult, along with the presence here of an intensely interested and powerful domestic opponent in the form of U.S. companies involved in foreign trade (also the plaintiffs in *Crosby*). It is, however, possible that in the wake of *Crosby*, subsequent sanctions packages might more likely include provisions expressly approving state-level selective purchasing and other measures alongside federal measures. To the extent that such savings clauses became boilerplate, *Crosby* would lose any continuing effect.

¹⁸⁰ For of course it is now well accepted that Congress and other non-judicial institutions contribute to the evolution of constitutional norms. See, e.g., J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1011-14 (1998) (describing the contribution of non-judicial actors to the making of constitutional norms); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 83-84 (1998) ("Among legal academics . . . it is now commonplace to discuss constitutional law as something larger and more complex than merely court rulings."); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 7-15 (1999) (describing scholarship focused on constitutional development outside the courts).

¹⁸¹ In this vein, Resnik highlights the possible "inventions" of transnational activity by subnational entities, including "joint ventures" in the form of transnational compacts. Resnik, *supra* note 7, at 671-80; see also Spiro, *supra* note 171, at 590-95 (suggesting that U.S. states could be permitted discretely to accede to human rights conventions in the absence of accession by United States). To the extent that this kind of activity takes place across national boundaries, it is also made possible only by disaggregation, the idea of which may be implicit in what Resnik calls the "permeability of institutions." Resnik, *supra* note 7, at 680.

transgress international norms and be held accountable for it. But that is what law is all about. In this context, globalization is what activates responsibility mechanisms that allow for independent action on the part of the states.

C. Individual Rights and Foreign Relations

There is, finally, the foreign relations differential in the sphere of individual rights. This category is a broad one, comprising at least two doctrinal strands. First, there are those individual activities that have been limited in the face of state responsibility, including communicating with foreign governments, traveling to foreign countries contrary to national security interests, and undertaking activities as a citizen of another country. Though these limitations have never posed significant constraints on individual rights and have dissipated with the erosion of the responsibility of states for the acts of their citizens, a form of disaggregation that to some extent antedated globalization, they nonetheless present an illustration of how the old global structures were reflected in U.S. law. Second, there is the plenary power doctrine, under which political branches have been afforded extreme deference in regulating the immigration status of aliens. This doctrine, persistent in the face of sustained academic attacks,¹⁸² is grounded in the perceived gravity of foreign relations and the perceived threat of aliens to national security. It is also related to notions of state responsibility, however, to the extent that aliens have been associated with their country of citizenship. It too should be reexamined in globalization's wake.

1. Restrictions on Speech, Association, and Travel

The restriction of the rights of American citizens as driven by the international context enjoys a lengthy pedigree. The 1799 Logan Act barred American citizens from unauthorized communications with foreign governments.¹⁸³ Although no prosecutions have been undertaken under the Logan Act, it has not been altogether a "paper tiger," in the suggestion of one commentator.¹⁸⁴ Although the Act has served

¹⁸² See sources cited *supra* note 15.

¹⁸³ The Logan Act provides:

Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 953 (2000).

¹⁸⁴ See Detlev F. Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 AM. J. INT'L L. 268, 268-69 (1966) ("Though only one indictment and no trial have taken place under the Act, who can tell when a new Administration, thinner skinned or harder pressed than its predecessors,

as the basis for only one indictment,¹⁸⁵ it has been invoked several times in the modern era as a threat against high-profile unofficial initiatives on the international stage,¹⁸⁶ evidencing a perception of the Act's contemporary legitimacy and likely resulting in deterred conduct as prohibited by the Act, at least in earlier times.¹⁸⁷

The Logan Act reflected old-world global concerns of high stakes and centralized responsibility. The overriding concern of both was the danger that the nation would be held responsible for the acts of individual citizens, with potentially catastrophic results. Thus, the Logan Act targeted communications outside of centralized, coordinated policy-making, which might be mistaken for authoritative pronouncements and result in the disruption of sensitive relationships. It is one of only a handful of criminal statutes in which American citizenship counts as a required element, and that applies regardless of territorial location.¹⁸⁸ Perhaps more than any other measure, the Logan Act embodied the "one voice" principle, insofar as it literally prohibited a form of speech.

The longstanding bar on active participation by a U.S. citizen in the political

may in its irritation call into play this sleeping giant.").

¹⁸⁵ *Id.* at 271 (describing an 1803 indictment of an individual for publishing a newspaper editorial advocating a separate western U.S. nation allied with France). The act's common name is owed to George Logan, a Philadelphia doctor whose freelance negotiations with France purportedly on behalf of the United States in 1798 were considered unhelpful by U.S. officials, and which resulted in enactment of the restrictions. *Id.* at 270–71.

¹⁸⁶ The most prominent example in the postwar era involved the contemplated investigation of House Speaker Jim Wright by the Reagan Administration for unauthorized discussions with officials of Nicaragua's Sandinista regime. Sara Fritz, *Wright's Latin Role Assailed by Republicans*, L.A. TIMES, Nov. 14, 1987, at A1. The Act has figured in other recent controversies. Congress requested that the Justice Department investigate Louis Farrakhan's contacts with Libyan leader Muammar Qaddafi. Michael Briggs, *Justice Dept. Investigates Farrakhan, Foreign Trip Spurs Probe*, CHI. SUN-TIMES, Feb. 16, 1996, at 1. House Republicans sought to prosecute a Clinton campaign staffer who allegedly attempted to persuade European Union officials to hold off on a trade deal until after the 1992 elections. John Maggs, *House Republicans Want Probe Into Possible Sabotage of Talks*, J. COM., Nov. 2, 1992, at 10A. President Reagan suggested that Jesse Jackson take notice of the measure in traveling to Cuba and Libya. Francis X. Clines, *Reagan Contends Jackson's Mission May Violate Law*, N.Y. TIMES, July 5, 1984, at A1; see generally Kevin M. Kearney, Note, *Private Citizens in Foreign Affairs: A Constitutional Analysis*, 36 EMORY L.J. 285, 303–11 (1987) (describing contemporary invocations of the Act).

¹⁸⁷ See Brad R. Roth, *The First Amendment in the Foreign Affairs Realm: 'Domesticating' the Restrictions on Citizen Participation*, 2 TEMPLE POL. & CIV. RTS. L. REV. 255, 266 (1993) ("[T]he lack of a judicial test has, paradoxically, preserved the Act as a latent weapon for use in chilling, or at least impugning, displays of dissent."); Vagts, *supra* note 184, at 271–80 (describing invocation of the measure from enactment until Cold War era); *id.* at 302 ("Although the [Logan Act] will not deter the bold world reformer, its shadows may warn off the more timorous.").

¹⁸⁸ Treason stands as the most prominent example. See 18 U.S.C. § 2381 (2000) (applying only to individuals "owing allegiance to the United States"); see also 18 U.S.C. § 2332a(b) (2000) (criminalizing the use or attempted use of weapons of mass destruction by U.S. nationals where the conduct occurs outside of the United States).

affairs of another country can be considered through a similar lens. The United States has never categorically prohibited dual citizenship; indeed, millions of Americans during the great waves of turn-of-the-century migration were dual nationals, at least as a technical matter.¹⁸⁹ But the United States has long precluded the active maintenance of an alternative nationality. First by administrative practice and then by statute, the undertaking of certain acts as a member of another polity resulted in the forfeiture of U.S. citizenship. These acts included holding office or serving in the military of another country; so seemingly inconsequential an act as voting in a political election in a foreign country also provided a ground for expatriation.¹⁹⁰

This prohibition on active dual nationality was also, at least in part, a by-product of the state responsibility regime. States were held responsible for the conduct of their citizens present on the territory of other states; controversies provoked by a citizen's participation in the political affairs of another country could give rise to bilateral difficulties. It was on this rationale that the Supreme Court upheld the revocation of citizenship on the ground of foreign voting in the 1958 decision in *Perez v. Brownell*.¹⁹¹ Echoing justifications for the political question doctrine and the exclusion of subfederal actors from foreign relations, Justice Frankfurter's majority opinion highlighted the possibility that such political activity by a U.S. citizen could be attributed to the United States itself, thus raising the prospect of "embarrassing" the U.S. government and of "embroiling this country in disputes with other nations."¹⁹² We see here again a rule explained by the attribution by the international community of an act of a component part of a state (in this case the individual citizen) to the state itself, together with the serious risks that could follow therefrom.¹⁹³

The denial of a passport to a United States citizen, and with it in effect the ability

¹⁸⁹ See generally Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411 (1997) (describing the U.S. Government's historical disfavor of dual citizenship).

¹⁹⁰ See Nationality Act of 1940, ch. 876, § 401, 54 Stat. 1168 (1941). On the expatriation regime that prevailed before the Supreme Court's decision in *Afroyim v. Rusk*, 387 U.S. 253 (1967), see generally John P. Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25 (1950).

¹⁹¹ 356 U.S. 44, 57 (1958).

¹⁹² *Id.* at 60. As Justice Brennan observed in *Trop v. Dulles*:

[M]any foreign nations may well view the political activity on the part of Americans, even if lawful, as either expressions of official American positions or else as improper meddling in affairs not their own. In either event the reaction is liable to be detrimental to the interests of the United States.

356 U.S. 86, 106 (1958) (Brennan, J., concurring). A 1907 act terminating the citizenship of U.S. citizen women upon marriage to aliens was upheld on similar reasoning. See *McKenzie v. Hare*, 239 U.S. 299, 312 (1915) ("It is the conception of the legislation under review that [marriage to an alien] may bring the Government into embarrassments and, it may be, into controversies.").

¹⁹³ See *supra* note 116 (highlighting centrality of "embarrassment" to foreign relations law cases); see also Vagts, *supra* note 184, at 297–99 (applying "embarrassment" paradigm to the Logan Act, but finding it insufficient to overcome First Amendment objections in most cases).

to travel internationally, has also been justified on such reasoning. Passports have been characterized in terms of responsibility; a passport is the equivalent of a letter of introduction in which the issuing sovereign vouches for the bearer and his conduct.¹⁹⁴

If an American passport holder were to engage in activity causing offense to a foreign nation, that responsibility could damage the nation's foreign relations. Coupled with the "great importance" of foreign policy, this notion of international responsibility stood prominently in the Supreme Court's upholding in *Haig v. Agee*¹⁹⁵ of the Secretary of State's power to revoke or deny passports to individual American citizens where the Secretary determined that a citizen's activity abroad undermined U.S. foreign policy.¹⁹⁶ A similar justification has grounded so-called area restrictions, under which all holders are prohibited from using passports for travel to designated countries.¹⁹⁷ In its 1965 decision in *Zemel v. Rusk*,¹⁹⁸ the Court upheld a ban on travel by U.S. citizens to Cuba in part because such travel might "involve the Nation in dangerous international incidents,"¹⁹⁹ rendering the restriction justified by the

¹⁹⁴ *Haig v. Agee*, 453 U.S. 280, 292 (1981); Passports and Registration, 3 Hackworth, DIGEST § 268, at 499; see also JOHN TORPEY, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE 160 (2000) (suggesting that passports have transformed travelers into "quasi-diplomatic representatives of particular countries, simply because the issuing state has usurped the capacity to authorize movement and thus 'embraced' the traveler as a citizen-member of the nation-state").

¹⁹⁵ 453 U.S. 280 (1981).

¹⁹⁶ The Court highlighted several episodes fitting neatly into the responsibility analysis, including the denial of a passport to an American residing in China whose promotion of "gambling and immoral houses" had developed into a scandal that was "likely to embarrass the United States." *Agee*, 453 U.S. at 296 & n.32; see also *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1146 (1971–1972) (describing, though disagreeing with, the "embarrassment" rationale for the denial of passports). The particular passport denial at issue in *Agee* fits less well into the responsibility paradigm than into one stressing the high stakes qualities of foreign relations. *Agee* intended to reveal the identity of U.S. Covert intelligence operatives while abroad, an activity that would have undermined national security directly, not by "embarrassing" the United States.

¹⁹⁷ See 22 U.S.C. § 211a (2000) (authorizing restriction of travel to countries "with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travelers"); see also 22 C.F.R. § 51.73 (2000) (authorizing Secretary of State to designate countries for which U.S. passports "shall cease to be valid").

¹⁹⁸ 381 U.S. 1 (1965).

¹⁹⁹ *Id.* at 15 (adverting to previous incidents under Castro's regime in which Americans had been imprisoned without charges). The reasoning in *Zemel* was premised on the possibility that a U.S. citizen would find himself requiring, as either a statutory or practical matter and at great potential cost, the diplomatic protection of the United States. See *id.* (citing the Hostage Taking Act, 22 U.S.C. § 1732 (1958), which requires the President to "use such means, not amounting to acts of war, as he may think necessary and proper" to secure the release of U.S. citizens detained by foreign governments); see also *Developments in the Law*, *supra* note 196, at 1145–46. This rationale also explains the more recent example of travel to Lebanon, which was prohibited during

“weightiest considerations of national security”²⁰⁰ against the backdrop of “the changeable and explosive nature of contemporary international relations.”²⁰¹

Indeed, the Logan Act and *Perez* prohibitions, as well as the passport denials, represented an extreme version of state responsibility. It is one thing to attribute the acts of governmental components of a state (namely, for our purposes, courts and subunit governments), another so to treat the unofficial, unsanctioned acts of private individuals merely by virtue of the tie of nationality. These practices also represented a departure from baseline constitutional values. With respect to the Logan Act and active dual citizenship, the differential is in the restriction of rights of speech and free association that would be protected in the domestic context.²⁰² One’s speech rights are, in the domestic context, not limited by the audience to which they are directed.²⁰³ Likewise, rights of political association are core to the First Amendment;²⁰⁴ one could hardly ban membership in an Irish fraternal organization in the way that the Nationality Act effectively banned membership in Ireland, the state. With respect to passport denial, the differential is in the restriction of the right to travel. In the domestic context, the right to travel has been held out as a constitutional touchstone.²⁰⁵ The *Agee* and *Zemel* decisions imply not just a limitation of that right in the international context, but its complete non-existence. In perhaps no other context has the foreign relations differential manifested itself so starkly.

Reflecting the doctrine’s zenith, state responsibility under international law for

the 1980s and 1990s in the wake of several hostage-taking incidents there. Again, the notion of responsibility is implicated, even though in this context it is a responsibility to the individual citizen rather than a responsibility for his conduct.

²⁰⁰ *Zemel*, 381 U.S. at 16 (“That the restriction which is challenged in this case is supported by the weightiest considerations of national security is perhaps best pointed up by recalling that the Cuban missile crisis of October 1962 preceded the filing of appellant’s complaint by less than two months.”).

²⁰¹ *Id.* at 17.

²⁰² See Roth, *supra* note 187, at 265–71 (considering the Logan Act’s consistency with the First Amendment); Vagts, *supra* note 184, at 293–99 (same).

²⁰³ Of course, there might be certain contexts in which restrictions of communications with foreign governments would satisfy the “compelling interest” test for restrictions on speech in any context, in which case one could assert the absence of a foreign relations differential. But to do so as a categorical matter, as does the Logan Act, would seem to give rise to a clear overbreadth problem. See *Gooding v. Wilson*, 405 U.S. 518 (1972) (striking down state statute criminalizing use of “opprobrious or abusive language”).

²⁰⁴ U.S. CONST. amend. I.

²⁰⁵ See, e.g., *Saenz v. Roe*, 526 U.S. 489 (1999) (affirming the right to interstate travel under the Privileges and Immunities Clause). The passport denials have also implicated First Amendment concerns where, as in the *Agee* case, they have been prompted by speech activities that a citizen intends to engage in while traveling abroad. See *Haig v. Agee*, 453 U.S. 280, 309 (1981) (considering a passport denial justified on the ground that the citizen intended to divulge sensitive national security information while abroad); Roth, *supra* note 187, at 269 (considering First Amendment aspects of *Agee*).

individual conduct corroded before the advent of globalization, and these examples of the foreign relations differential corroded along with it. Because the international community no longer assumes that individuals represent their country of citizenship, there is no harm to be protected against by constraining their activity in or with foreign polities. Thus application of the Logan Act against private individuals has not been contemplated in the recent past,²⁰⁶ there have been no recent reports of passport denials on foreign policy grounds,²⁰⁷ and the maintenance of active dual citizenship has been tolerated since 1968, when the Court overruled the decision in *Perez*.²⁰⁸ Although the passport denial provisions upheld in *Agee* remain on the books, they appear rarely, if ever, to be deployed in individual cases; and the use of area restrictions has withered to a small handful of rogue states.²⁰⁹ The law and practice here has already conformed itself to the change in international context and how that context has constructed the scope of the state.²¹⁰

²⁰⁶ Although the act has occasionally been invoked in recent decades, *see supra* note 186, leaving aside instances in which Americans have dallied with rogue leaders, it appears to have no continuing efficacy.

²⁰⁷ Passports, of course, may be denied on other grounds, including, for instance, where the applicant poses a flight risk from criminal prosecution, but such denials do not implicate foreign relations.

²⁰⁸ *See Afroyim v. Rusk*, 387 U.S. 253 (1967).

²⁰⁹ Such restrictions appear currently to include only Libya, *see* 65 Fed. Reg. 75,761 (Dec. 4, 2000), and Iraq, *see* 66 Fed. Reg. 14,241 (Mar. 9, 2001); *see also* *Zemel v. Rusk*, 381 U.S. 1, 8–11 (1965) (describing historical examples of travel restrictions). More prevalent today than in the past are restrictions on the expenditure of funds by U.S. citizens in certain states, including Cuba, North Korea, and Serbia. *See* 31 C.F.R. pt. 500 (2000). But those restrictions have the objective of tightening sanctions regimes imposed on those countries, an objective unrelated to responsibility imposed by international law. In that sense, the expenditure restrictions are difficult to situate in the same differential category as travel restrictions.

²¹⁰ The 1794 Neutrality Act, which criminalizes the launching of hostile expeditions from the United States against nations with which the United States is “at peace,” *see* 18 U.S.C. § 960 (2001), presents a partial fit with the contingency model. The Act was driven by the international legal responsibility of the United States for such expeditions. *See, e.g., The Three Friends*, 166 U.S. 1, 52–53 (1897) (recognizing the Neutrality Act as in furtherance of international law obligations); H. Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, 22 AM. J. INT’L L. 105 (1928); Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT’L L. J. 1, 15–20 (1983). Conduct prohibited by the Act thus posed an extreme threat to the national interest, insofar as privately-sponsored expeditions could result in retaliatory measures, including armed attacks, against the United States by the foreign country involved. *See, e.g., United States v. O’Sullivan*, 27 F. Cas. 367, 376 (D.C.N.Y. 1851) (No. 15,974) (“The rule is founded on the impropriety and danger of allowing individuals to make war on their own authority, or, by mingling themselves in the belligerent operations of other nations, to run the hazard of counteracting the policy or embroiling the relations of their own government . . .”); Neutrality, 7 MOORE DIGEST § 1300, at 923 (quoting Millard Fillmore’s second annual message to Congress, “[n]o individuals have the right to hazard the peace of the country . . . upon vague notions of reforming governments in other states”). This concern figured in the passage of the measure. *See* 4 ANNALS OF CONG. 743 (1794)

2. Plenary Power and the Rights of Aliens

Far more glaring and controversial, both in terms of the differential presented and the numbers of persons affected, has been the so-called plenary power doctrine, under which aliens have been deprived of most rights of due process in immigration proceedings.²¹¹ Pronouncements from the Court in the field of immigration law are replete with statements that would shock the sensibilities of the domestic constitutional lawyer.²¹² Perhaps most famously, the Court in *Knauff* held that

(remarks of Congressman Ames) (noting purpose of the bill to prevent being "driven into war by the licentious behavior of some individuals"). Prosecutions under the Act were once assiduous, especially in the context of nineteenth century Latin American liberation movements. *See, e.g.,* *Wiborg v. United States*, 163 U.S. 632 (1896) (expedition to liberate Cuba from Spanish rule); *United States v. Smith*, 27 F. Cas. 1233 (C.C.D.N.Y. 1806) (No. 16,342a) (prosecution involving expedition intended to help liberate Venezuela from Spanish rule). Indeed, the Act was once amended at the request of Spain to clarify its application to colonial holdings. *See The Three Friends*, 166 U.S. at 55–56. Consistent with the model proposed in this article, the Act has recently fallen into disuse with the attenuation of state responsibility for individual conduct. For instance, where the participation of U.S. citizens as Kosovar freedom fighters might once have posed serious diplomatic and military complications, such activity in the current context was hardly worthy of note, except as fodder for newspaper features. *See* David Stout, *Marching Off to Other Nations' Wars, Americans Must Tiptoe Around a 1794 Neutrality Act*, N.Y. TIMES, Apr. 20, 1999, at A14; *see also, e.g.,* Lobel, *supra* (describing the Neutrality Act's decline).

But the fit with the model is incomplete. First, in contrast to the Logan Act, the statute's coverage is defined not in terms of citizenship but rather of territory. The Act applies to activity by aliens in the United States; it does not apply to conduct initiated by U.S. citizens outside of the American territory. In this respect the measure does not reflect the aggregation of individuals to the state. Second, it is difficult to locate the constitutional baseline from which the Neutrality Act represents a departure. Much of the activity covered by the Act is simply criminal. Some is commercial. *See* 13 Op. Att'y Gen. 177, 180 (1870) ("To prevent our mechanics and merchants from building ships of war and selling them on the markets of the world, is an interference with their private rights which can only be justified on the ground of a paramount duty in our international relations . . ."). It is also true that the Act has been used to punish activity that would clearly qualify as "freedom fighting." *See, e.g.,* *United States v. Leon*, 441 F.2d 175 (5th Cir. 1971) (involving attempts to depose the Duvalier dictatorship in Haiti); *Casey v. United States*, 413 F.2d 1303 (5th Cir. 1969) (same). In that respect it may be taken as derogating from vaunted American principles supporting the cause of democracy abroad as well as at home. But the Act's objective of prohibiting armed activity ultimately seems to coincide with the institutionalization and democratic peace phenomena. In other words, globalization justifies the Act's persistence even if it does not explain its origins.

²¹¹ *See, e.g.,* Henkin, *supra* note 15; Legomsky, *supra* note 15; David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Schuck, *supra* note 15.

²¹² *See, e.g.,* Aleinikoff, *supra* note 15, at 865 ("Immigration law has remained blissfully untouched by the virtual revolution in constitutional law since World War II . . .").

"whatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned."²¹³ Aliens seeking initial entry at the border are denied any constitutionally mandated quantum of procedural or substantive due process rights;²¹⁴ those within the country have no substantive rights and only limited procedural rights.²¹⁵ The constitutional treatment of aliens has long been lamented by scholars, most recently in the wake of 1996 immigration law reforms broadening the grounds for deportation and scaling back statutory protections in removal proceedings.²¹⁶ The use of secret evidence in removal proceedings had attracted widespread media attention even before the September 11 attacks brought it regularly to the headlines.²¹⁷

This area of constitutional doctrine is once again amenable to contextual explanation. As Justice Frankfurter observed in his concurrence in *Harisiades*, "[i]t is not for this Court to reshape a world order based on politically sovereign States."²¹⁸ Perhaps more than in any other area, the cases here appeal to the overriding concerns of national security and the perils of a hostile world. Several of the decisions most restrictive of alien rights were, not coincidentally, delivered at the height of the Cold War.²¹⁹ The plenary power cases repeatedly advert to the sensitive element of foreign

²¹³ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

²¹⁴ *See id.*

²¹⁵ *See, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (finding no substantive due process rights for aliens in deportation proceedings); *The Japanese Immigrant Case*, 189 U.S. 86 (1903) (holding that a landed immigrant is entitled to procedural due process in deportation proceedings); *see also Landon v. Plasencia*, 459 U.S. 21, 33 (1982) (confirming that a "continuously present resident alien has a right to due process," while noting that the Court has "rarely held that the procedures provided by the executive were inadequate").

²¹⁶ *See, e.g., Stephen H. Legomsky, Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998).

²¹⁷ *See, e.g., Vernon Loeb, Iraqi Dissidents' American Dream and Nightmare: Nebraska Warmth Contrasts with Kafkaesque INS Ordeal*, WASH. POST, Dec. 28, 2000, at A1 (reporting on the plight of the "Iraqi Six," whose exclusion from the United States had been sought on the basis of secret evidence); Ronald Smothers, *U.S. Bars or Expels Suspect Immigrants on Secret Evidence*, N.Y. TIMES, Aug. 15, 1998, at A1 (reporting on the use of secret evidence in more than two dozen exclusion and deportation cases). The secret evidence cases have provoked scathing editorial comment. *See, e.g., Anthony Lewis, The Uses of Secrecy*, N.Y. TIMES, Nov. 4, 2000, at A21 (applauding the court-ordered release of an alien held on the basis of secret evidence); *Secrecy and Due Process*, WASH. POST, Oct. 25, 1999, at A28 (concluding that the use of secret evidence "can never be legitimate").

²¹⁸ *Harisiades*, 342 U.S. at 596 (Frankfurter, J., concurring).

²¹⁹ *See, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 214-16 (1953) (upholding the exclusion of an alien notwithstanding the practical result of indefinite detention in the face of refusals by any other country to accept him); *Harisiades*, 342 U.S. at 596 (upholding the deportation of three long-term permanent resident aliens on the basis of former membership in the Communist Party); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544-47 (1950) (upholding, on the basis of secret evidence, the exclusion of an alien seeking admission as a war bride).

relations in immigration decision-making and the resultant need for extreme judicial deference to the will of the political branches.²²⁰ There is in this respect a clear doctrinal overlap between the political question and plenary power cases.²²¹

Although not as direct as in other areas, the element of state responsibility also entered into the plenary power equation. Here, however, it was not the responsibility of the United States for the individuals involved (obviously, as they were aliens), but that of the countries of which they were nationals. For constitutional purposes, aliens have been treated not as individuals but rather as components of other nations. In that respect, they have been considered as part of the international threat in the world of hostile nation-states; they have been assumed, by U.S. courts, to be doing the bidding of their country of nationality, and as such are a threat to U.S. security.²²² It has also

²²⁰ See *Harisiades*, 342 U.S. at 588–89 (observing “that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power”); *Knauff*, 338 U.S. at 542 (“The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (“The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government . . .”); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (stating that the power to exclude aliens “is vested in the national government, to which the Constitution has committed the entire control of international relations”); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) (“To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated.”).

²²¹ See, e.g., *Fong Yue Ting*, 149 U.S. at 712 (denying the applicability of the Due Process Clause in a deportation case, concluding that “it behooves the Court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to other departments of the government”); FRANCK, *supra* note 15, at 54–55; Fritz Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 579 n.218 (1966). Indeed, in some respects plenary power is more readily situated with the political question doctrine as part of the foreign relations differential. One can explain plenary power as a matter of institutional deference to the political branches rather than a substantive delimitation of the rights of aliens. See, e.g., Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1, 32–40. Continuing assaults on the plenary power in the wake of September 11 may also be more successful along this line of attack, insofar as the political question doctrine turns more on the disaggregation of the state (a question of institutional recognition) rather than on the assertion of diminished security threats. On the other hand, there can be no doubt that the plenary power doctrine has had the effect of diminishing the rights of aliens in the immigration process, eliminating a check on political branch overreaching.

²²² The *Harisiades* decision, for instance, accepted as an institutional matter a legislative premise that “the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists.” *Harisiades*, 342 U.S. at 590. The Court also stressed the “ambiguity of [the alien’s] allegiance” in retaining original citizenship. *Id.* at 587. Frankfurter’s concurrence stressed the fact of the international ordering “whereby the citizens of each State are aliens in relation to every other state.” *Id.* at 596 (Frankfurter, J., concurring).

been assumed that their interests will be protected on the international plane by their country of nationality, so that even as they are deprived of individual constitutional rights, their rights will be protected through diplomatic channels.²²³ Here it was U.S. assimilation of the doctrine of state responsibility, rather than its assertion by other states, that gave rise to the foreign relations differential.

In its historical international context, perhaps such justifications for the plenary power doctrine were plausible. Particular applications of the state responsibility doctrine were, to be sure, sometimes formalistic. For the deportable Communists in the *Harisiades* case, for example, the possibility of diplomatic protection hardly amounted to an equal substitute for the constitutional rights denied.²²⁴ But in the old world of hostile nation-states, it may not have been in all cases unwarranted to ascribe antagonistic loyalties to the citizens of other states and to afford political branch decision-making on immigration greater deference than in the domestic sphere. Especially in the Cold War context, the downside risk of erroneous entry decisions was potentially catastrophic, involving, at least in theory, the survival of the nation itself.²²⁵ That is not to say that such cases as *Knauff*, *Mezei*, and *Harisiades* were rightly decided. On the contrary, history has shown them to have been unjust responses to the perceived Soviet threat.²²⁶ But it is easy to draw hypothetical cases in which the deprivation of due process would have been justified from the perspective of the overriding national interest.²²⁷

²²³ See, e.g., *id.* at 585 (highlighting that an alien “may claim protection against our Government unavailable to the citizen . . . he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf”); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) (“If the government of the country of which the foreigners are excluded are subjects is dissatisfied with this action it can make [a] complaint to the executive head of our government . . . and there lies its only remedy.”).

²²⁴ *Harisiades* involved the deportation of three aliens of Greek, Italian, and Soviet nationality respectively, all of whom had been residing in the United States for at least thirty years. 342 U.S. at 581–83. The probability of the anti-Communist Greek or Italian governments exercising diplomatic protection in favor of former Communist Party members must have been slim; and even if willing, the Soviet Union would not have been in much of a position to assist its nationals in the United States at the height of the Cold War. In other words, the additional rights afforded aliens under international law would hardly have made up for the absence of constitutional protections at the time the case was decided.

²²⁵ As Justice Jackson intoned in *Harisiades*, acknowledging the constitutional significance of global context, “[w]e think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government’s power of deportation.” 342 U.S. at 591; see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 216 (1953) (rejecting the relevance of other countries’ refusal to accept an excludable alien, observing that “the times being what they are, Congress may well have felt that other countries ought not to shift the onus to us”).

²²⁶ See Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 954–84 (1995) (recounting how Knauff and Mezei eventually won admission into the United States).

²²⁷ For example, if the exclusion of an alien were based on intelligence whose origin could not

But however one comes down on the historical justifications of the plenary power doctrine, they offer no support for its persistence. To the extent the doctrine may once have represented an appropriate response to the international context, globalization has brought that foundation into question. First, the risk of catastrophic, unrestrained state-to-state conflict has diminished to the point where it is no longer plausible to assert that the nation's survival hangs in the balance thereby. There is today no foreign menace on the order of the Cold War Soviet Union. Indeed, as a part of the democratic peace, there is today no significant state-based foreign threat of any description. Even if there were, assumptions of an individual's allegiance to her country of nationality (or, more accurately, to the government in control of that country), contrary to U.S. interests, seem misplaced in today's world. Those of Iraqi nationality present in or seeking to enter the United States can, for example, hardly be assumed to be loyal to the regime of Saddam Hussein. The premises on which plenary power was based have been eroded.

Nor does terrorism appear to offer an alternative foundation. One surely cannot assimilate terrorists to their country of nationality, which is all but irrelevant to the threat they pose or their place in the world.²²⁸ As explained above,²²⁹ one cannot make an equivalence between the historical threat of conflict between states and the dangers, however grave, posed by terrorist activity, even in the wake of September 11. Unlike interstate conflict, terrorism can be addressed with a law enforcement model, complete with its baseline constitutional protections. One does not reduce the due process rights of mobsters, drug traffickers, or Timothy McVeighs for fear that they, their organizations, or other sympathetic elements will overwhelm law enforcement and cause continuing injury. To separate out immigration and aliens for differential constitutional treatment on the grounds that some terrorists are aliens emerges as a category mistake.

Thus, even an intensified onslaught of terrorism should not impede the reproblematicization of the constitutional anachronisms of immigration law. That does not mean that constitutional frameworks will yield the same answers across the immigration/non-immigration divide, or even within the context of immigration law. Take the use of secret evidence in removal proceedings. The Immigration and

have been disentangled from the information itself. Assume that a mole in the inner circles of the Kremlin identified an incoming saboteur, whose identity was known only to a very few Soviet officials. To have revealed to the alien such information as the basis for his exclusion would have compromised the continuing utility and safety of the source, whose information might have been considered critical in the bipolar struggle. This sort of scenario may seem farfetched today, but at the height of the Cold War it was plausible if not persuasive.

²²⁸ Fifteen of the nineteen individuals involved in the September 11 attacks were nationals of Saudi Arabia, a staunch U.S. ally. The others were from Egypt, Lebanon, and the United Arab Emirates, and the alleged would-be twentieth hijacker is a French citizen. Neil A. Lewis & David Johnston, *Justice Dept. Identifies 19 Men as Suspected Hijackers*, N.Y. TIMES, Sept. 15, 2001, at A2.

²²⁹ See *supra* text accompanying notes 53–57.

Nationality Act²³⁰ has long provided for the use of secret evidence with respect to the exclusion of aliens seeking entry to the United States and applications by aliens for various forms of discretionary relief.²³¹ In 1996, its use was permitted in removal proceedings involving allegations of terrorist activity.²³² Those so-called "Alien Terrorist Removal Procedures" provide for the establishment of a special court.²³³ In the terrorist cases, secret evidence on which basis removal is sought will in all cases be reviewed in camera by a judge of the court.²³⁴ When possible, an unclassified summary of the secret evidence will be delivered to the alien whose removal is sought.²³⁵ In cases involving permanent resident aliens, the court is required to appoint a "special attorney" to represent the alien's interests, who is cleared to review classified information and thus permitted to review the secret evidence, though barred from revealing the information to his alien client.²³⁶

In other contexts, the use of secret evidence is anathema to our constitutional system, offending due process norms and the right to confront evidence.²³⁷ In the foundational plenary power decisions of *Knauff* and *Mezei*—the latter involving a permanent resident alien whose exclusion raised the specter of his indefinite detention²³⁸—the Supreme Court upheld the unrestrained use of secret evidence (that is, where the evidence was not reviewed by any official outside of the executive branch, much less by the alien herself) with barely a nod to constitutional due process.²³⁹ In the wake of globalization and the diminished threat of interstate conflict, the rationale for the departure from due process norms comes into question. Before September 11, the use of secret evidence was coming under a sustained attack, both in the courts and in Congress, as fueled by media attention to the

²³⁰ Immigration and Nationality Act of 1952, ch. 4, § 235(c), 66 Stat. 198 (current version at 8 U.S.C. § 1225(c) (2000)).

²³¹ See *id.* (authorizing the Attorney General to remove arriving aliens on the basis of "confidential information"); see also 8 U.S.C. § 1229a(b)(4)(B) (2000) (allowing an alien to examine evidence against the alien in removal proceedings, except "such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under [the Immigration and Nationality Act]").

²³² See Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §§ 1531–37 (Supp. IV 1998) (setting forth special procedures, including the use of confidential information, in removal cases involving terrorists).

²³³ *Id.* § 1532(a).

²³⁴ *Id.* § 1534(e)(3)(A).

²³⁵ *Id.* § 1534(e)(3)(B).

²³⁶ *Id.* § 1534(e)(3)(F).

²³⁷ See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him . . .").

²³⁸ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 207 (1953).

²³⁹ *Mezei*, 345 U.S. at 212; *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543–44 (1950).

issue.²⁴⁰ Several decisions limited its use in the context of denials of discretionary relief.²⁴¹ Serious moves were afoot to scale back on legislative authority for its use in removal proceedings.²⁴² With respect to the unchanneled use of secret evidence in removal proceedings and applications for discretionary relief, September 11 provides no cause to retard this trend, at least not in the courts.²⁴³ Executive branch protestations that such power is necessary to combat terrorist threats seem alarmist, up against the alternative of some form of in camera review by the courts to prevent against arbitrary enforcement decisions.²⁴⁴

Deployment of the 1996 alien terrorist removal procedures presents a different story. The procedures have not been used to date; September 11 may well result in the first test cases.²⁴⁵ Abandoning plenary power and a differential approach would not necessarily result in a finding of unconstitutionality. The fact is that most of the regime now in place for the removal of alleged terrorists could pass constitutional muster under non-exceptional analyses. In other words, the Court could approach constitutional challenges to the removal of terrorists with its usual toolbox, and find those challenges wanting. The result is the same as under plenary power, but the judiciary would assert itself as a relevant player and the Constitution as the relevant

²⁴⁰ Perhaps most significant was a *60 Minutes* segment on the plight of Iraqis who were denied entry on the basis of secret evidence. See *60 Minutes: Unfinished Business* (CBS television broadcast, Mar. 28, 1999) (chronicling the plight of Iraqi dissidents who had worked with the CIA to overthrow Saddam Hussein). Their cause was championed by former Central Intelligence Agency director James Woolsey. These proceedings did not yield any judicial decisions regarding the use of secret evidence. See *5 Iraqis Are Released from U.S. Detention Center*, N.Y. TIMES, June 25, 1999, at A18 (describing agreement with the Immigration and Naturalization Service in which aliens were released pending acceptance by another country).

²⁴¹ See *Najjar v. Reno*, 97 F. Supp. 2d 1329, 1362 (S.D. Fla. 2000) (finding reliance on secret evidence in denying bond to violate a deportable alien's due process); *Kiarelddeen v. Reno*, 71 F. Supp. 2d 402, 411–19 (D.N.J. 1999) (finding that the use of secret evidence to justify detention during removal proceedings violated a resident alien's due process rights); see also *Haddam v. Reno*, 54 F. Supp. 2d 588, 598 (E.D. Va. 1999) (denying on jurisdictional grounds an alien's challenge to the use of secret evidence in exclusion proceedings, but characterizing such use as "an obnoxious practice, so unfair that in any ordinary litigation context, its unconstitutionality is manifest").

²⁴² See Secret Evidence Repeal Act, H.R. 2121, 106th Cong. (2000); see also Tim Weiner, *Congress Reviewing Use of Evidence Kept Secret*, N.Y. TIMES, May 23, 2000, at A19.

²⁴³ Efforts to secure legislative repeal will of course be set back in the wake of September 11, although Congress has shown some surprising fortitude in resisting proposals that would have significantly expanded executive branch discretion with respect to the treatment of suspected alien terrorists.

²⁴⁴ Here again a hypothetical comparison to the Cold War era is instructive. It is possible to conceive of Cold War scenarios in which the disclosure of intelligence assets high in the Kremlin apparatus even to judges could have posed an intolerable security risk. On the law enforcement model, similar disclosure with respect to terrorist groups seems unexceptional.

²⁴⁵ See, e.g., William Glaberson, *U.S. Asks to Use Secret Evidence in Many Cases of Deportation*, N.Y. TIMES, Dec. 9, 2001, at B1.

standard.

Thus, the legislative scheme for the removal of terrorists on the basis of secret evidence could be rationalized within a *Mathews v. Eldridge*²⁴⁶ framework. As applied against permanent resident aliens whose removal is sought—the case in which the individual interest is greatest—the special removal procedures supply an elaborate scheme intended to safeguard individual interests while protecting against the disclosure of information that would harm the national security.²⁴⁷ The scheme would not pass muster were it applied in the context of criminal prosecutions.²⁴⁸ But however grave a remedy it may be, deportation would seem (on average) one level removed from imprisonment, and the distinction, perhaps, allows for a finding of adequate due process in this context. A *Mathews* analysis might even sustain some unconstrained uses of secret evidence, at least where the alien's interest is not grave. The removal on the basis of secret evidence of an arriving alien on a tourist visa does not seem dramatically unjust, even if the procedure will sometimes generate false positives, given the relatively insubstantial individual interest at stake. These are close questions; and a strong case could be made against finding these procedures to satisfy due process requirements.²⁴⁹ Eliminating a foreign relations differential does not always change results, just as not all constitutional challenges to governmental deprivations are successful.

Those cases in which secret evidence is used are, of course, exceptional. In most cases, immigration proceedings are totally removed from foreign policy considerations. The arguments for a continuing foreign relations differential in these cases is weaker still. The equal protection challenge rebuffed on plenary power reasoning in *Fiallo v. Bell*²⁵⁰ is instructive. The *Fiallo* decision considered an immigration act provision that discriminated against fathers in their capacity to petition for the admission of (or be petitioned for by) their illegitimate children,

²⁴⁶ 424 U.S. 319 (1976). *Mathews* has elsewhere been imparted in the immigration context. See *Landon v. Plasencia*, 459 U.S. 21, 32–34 (1982) (applying the *Mathews* framework to find the exclusion of a returning permanent resident alien unconstitutional on procedural due process grounds).

²⁴⁷ See 8 U.S.C. § 1534(e)(3) (2000) (providing for disclosure to “special attorney” representing alien’s interests of secret evidence on which basis removal is sought).

²⁴⁸ See, e.g., *Greene v. McElroy*, 360 U.S. 474, 496 (1959) (“[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.”).

²⁴⁹ Compare Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, STAN. L. & POL’Y REV., Summer 1996, at 23 (generally approving of terrorist removal procedures), with Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY’S L.J. 833 (1997) (condemning removal procedures).

²⁵⁰ 430 U.S. 787 (1977).

relative to the capacity of mothers of such children.²⁵¹ Outside the immigration context, such a provision would face a double-barreled intermediate scrutiny for discrimination on the basis both of gender and legitimacy.²⁵² The Court, however, afforded the claim no more than a rational basis-type review,²⁵³ accepting stereotype-based arguments that would never pass muster in the ordinary domestic context.²⁵⁴ On top of the usual recitations of plenary power themes, the Court adverted to the potentially sensitive foreign relations issues posed by immigration policy-making.²⁵⁵

The invocation of foreign relations interests was absurd even in 1971 with respect to the discrimination addressed in *Fiallo*. And yet the Court's decision demonstrates how reticent it was to involve itself in any aspect of immigration lawmaking, for fear of upsetting foreign relations. And perhaps in that context the decision was defensible on that basis. To have afforded non-differentiated review in one area, even one with so little possible bearing on foreign relations, might have been difficult to cabin on any principled basis. To have ruled otherwise in *Fiallo*, in other words, might have left the Court with few moves by which to avoid ruling in a case that did in fact involve foreign relations. Better to maintain the strict agnosticism on immigration matters generally.

As of 1971, that position was weak but tenable. In the persistent shadow of the Cold War, immigration did still implicate a significant foreign relations component. Indeed, immigration issues comprised a significant component of our bilateral relationship with the Soviet Union.²⁵⁶ Although much of immigration policy was far

²⁵¹ At the time of the decision in *Fiallo*, the relationship of the father and his child born out of wedlock had no status under the immigration law, while a mother's relationship with such a child was recognized as equivalent to that of a parent and a legitimated child. *See id.* at 797 (describing genesis of statutory scheme). The illegitimate child could not petition for the admission of his father nor the reverse. Current law provides for recognition of the father-illegitimate child where the "father has or had a bona fide parent-child relationship" with the child. 8 U.S.C. § 1101(b)(1)(D) (2000).

²⁵² *See Stanley v. Illinois*, 405 U.S. 645 (1972) (striking down a state law that categorically denied the rights of a father to care for an illegitimate child).

²⁵³ *Fiallo*, 430 U.S. at 793 n.5 (accepting only "limited judicial responsibility" for reviewing the power of Congress over the admission and exclusion of aliens).

²⁵⁴ *See id.* at 792 ("[I]n the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'") (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)).

²⁵⁵ *Id.* at 796 (rejecting claim that unlike other immigration law decisions this one did not involve foreign policy; deferring to congressional classification because "these matters may implicate our relations with foreign powers") (quoting *Diaz*, 426 U.S. at 81).

²⁵⁶ As evidenced by the Jackson-Vanik amendment to the Trade Act of 1974, under which the Soviet Union (and other nations with non-market economies) would be denied favorable trade status insofar as it "seriously restrict[ed]" the right of its citizens to emigrate. *See* 19 U.S.C. § 2432 (1994); *see also* HENRY A. KISSINGER, *WHITE HOUSE YEARS 1271-73* (1979) (describing the importance of negotiation with the Soviet Union over the question of Jewish emigration); Aristide R. Zolberg, *From Invitation to Interdiction: U.S. Foreign Policy and Immigration Since 1945*, in

removed from the summit table, this high diplomacy element may have deterred the courts from any intrusion in the field. Because of their competence and expertise in the making of foreign policy-making, the political branches were assumed to have appropriately calibrated immigration policy in the nation's best interests.²⁵⁷ For the judiciary to disturb that calculation would have posed the same dangers as with other foreign relations matters. Today, the foreign relations content of immigration decision-making has diminished.²⁵⁸ Although immigration may still figure in some foreign policy contexts (Haiti and Cuba, most notably in recent years²⁵⁹), in the wake of the democratic peace it no longer implicates, even potentially, the high stakes of the Cold War years.

In the face of globalization, then, the plenary power doctrine should be abandoned, and immigration laws and their application subjected to standard constitutional tests. Once again, those tests are flexible ones that can be adapted to the peculiarities of the immigration context. Thus, those denied visas might, under the *Mathews* framework, be afforded only an administrative second look, rather than full judicial review. That would not mark a significant departure from existing practice.²⁶⁰ In some cases, however, eliminating the foreign relations differential and deploying standard constitutional analysis would impose new discipline on immigration lawmakers.²⁶¹

That process appears to have begun. With two possibly watershed decisions in its 2000 Term, the Court has indicated its willingness to reconsider the plenary power doctrine. In *Nguyen v. INS*,²⁶² the Court considered a naturalization provision that, similarly to the measure at issue in *Fiallo*, disadvantaged the father-child relationship

THREATENED PEOPLES, THREATENED BORDERS 117, 135–37 (Michael Teitelbaum & Myron Weiner eds., 1995).

²⁵⁷ See *supra* note 111 and accompanying text.

²⁵⁸ See, e.g., Sergio Diaz-Briquets, *Relationship Between U.S. Foreign Policies and U.S. Immigration Policies*, in THREATENED PEOPLES, *supra* note 256, at 160–161 (“U.S. immigration policies (other than refugee policies) since the 1960s have been largely driven by domestic agendas. Foreign policy concerns have been rarely taken into account, and when they have, only tangentially.”).

²⁵⁹ See, e.g., Charles B. Keely, *The Effects of International Migration on U.S. Foreign Policy*, in THREATENED PEOPLES, *supra* note 256, at 215, 225–27 (discussing the Cuban refugee problem); Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994) (discussing policies for solving the Haitian refugee problem).

²⁶⁰ See T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY (4th ed. 1998) (describing informal review mechanisms for review of visa determinations); U.S. COMM’N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 181–82 (1997) (recommending formal administrative review be available for denial of certain types of visas).

²⁶¹ See, e.g., Martin, *supra* note 211, at 208–34 (applying the *Mathews* test to a range of immigration-related decisions).

²⁶² 121 S. Ct. 2053 (2001).

relative to the mother-child relationship in the context of out-of-wedlock births.²⁶³ Although the Court upheld the discriminatory scheme, it did so after applying the same constitutional analysis that it would have applied in the domestic context.²⁶⁴ In other words, it addressed the question as if there were no foreign relations differential. Indeed, the Court expressly bracketed “the implications of statements in our earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power.”²⁶⁵ That statement itself impliedly puts plenary power back into play, even in the face of its long doctrinal pedigree.

The Court’s decision in *Zadvydas v. Davis*²⁶⁶ confirms the possibility of a turning point. *Zadvydas* rejected the indefinite detention of deportable aliens whose homelands refused to accept their repatriation. Although the decision rested as a formal matter on statutory interpretation—the Court found the detention provision of the immigration act not to afford the Attorney General the power to undertake such indefinite detention²⁶⁷—the interpretation was itself grounded on the serious constitutional problems that the Court found the practice to raise.²⁶⁸ The decision,

²⁶³ With respect to the child born out of wedlock to a U.S. citizen mother and alien father, the child is extended U.S. citizenship automatically at birth. See 8 U.S.C. § 1409(c) (2000). The child born out of wedlock to a U.S. citizen father and alien mother, by contrast, must show that the father agreed to provide financial support for the child before reaching the age of eighteen, as well as (also before the age of 18) establish that the relationship was either legitimated, acknowledged by the father, or established by a court. 8 U.S.C. § 1409(a) (2000). In 1998, the Supreme Court rejected on standing grounds a challenge to the same provision. See *Miller v. Albright*, 523 U.S. 420 (1998); see also Pillard & Aleinikoff, *supra* note 221, at 30–32 (arguing that in the wake of the *Miller* decision, the challenged provision should be considered unconstitutional).

²⁶⁴ See *Nguyen*, 121 S. Ct. at 2058–66. In applying the standard constitutional test for gender-based classifications, see, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996) (requiring that such classifications be “substantially related” to the achievement of “important governmental objectives”), the Court found the discriminatory provision adequate to further governmental interests in determining the existence of a biological father-child tie and in assuring that existence of a genuine relationship between the citizen father and the child and with it a genuine tie to the United States. See *Nguyen*, 121 S. Ct. at 2058–66. Whether the equal protection analysis in *Nguyen* is well-founded is altogether another matter. See Joanna Grossman, *A Victory for Motherhood and for Sexism*, at <http://writ.news.findlaw.com/grossman/20010618.html> (June 18, 2001) (“The Court’s decision is remarkable not only because it condones Congress’ blatant sex discrimination, but also because it does so without a second thought.”).

²⁶⁵ *Nguyen*, 121 S. Ct. at 2065.

²⁶⁶ 121 S. Ct. 2491 (2001).

²⁶⁷ The detention was undertaken under 8 U.S.C. § 1231(a)(6) (2000), which by its terms imposes no time limits on the length of such continuing detention. *Id.*

²⁶⁸ See *Zadvydas*, 121 S. Ct. at 2502 (finding that “an alien’s liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent”) (citation omitted). In concluding that the detention raised constitutional problems, the Court applied doctrine relating to civil confinement, developed outside of the immigration and foreign relations law context. See *id.* at 2498–500; see also, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997) (requiring special

with a tone unprecedented in other immigration decisions, emphasized that the immigration power “is subject to important constitutional limitations.”²⁶⁹ As in *Nguyen*, the decision refused to consider the general scope of the immigration power.²⁷⁰ Perhaps without precedent, the Court rejected the government’s assertion of a foreign policy interest.²⁷¹ To the extent the decision recognized the need for deference to the political branches in the context of immigration law, it did so by reference to “[o]rdinary principles of judicial review.”²⁷² Insofar as these principles themselves recognize “the Nation’s need to ‘speak with one voice’ in immigration matters”²⁷³ as well as “Executive Branch primacy in foreign policy matters,”²⁷⁴ the Court found, they “require courts to listen with care when the Government’s foreign policy judgments . . . are at issue, and to grant the Government appropriate leeway when its judgments rest upon foreign policy expertise.”²⁷⁵ That standard—listening with care and granting appropriate leeway—is a far cry from the world in which the invocation of foreign relations effectively afforded the executive branch a trump card against standard constitutional constraints.

Zadvydas and *Nguyen* may thus open a breach not only with respect to plenary power, but also with respect to the foreign relations differential more generally. Although the opinions made no allusion to the changed global context in which they

procedural protections for civil commitments based on predictions of future dangerousness); *Foucha v. Louisiana*, 504 U.S. 71 (1992) (holding confinement of insanity acquittee on the basis of antisocial personality to be a violation of due process).

²⁶⁹ *Zadvydas*, 121 S. Ct. at 2501. As Alex Aleinikoff observes, “the laconic, astonishingly casual, phrase may represent a radical shift, a turning point for immigration law” in the same way that *Miranda* was a watershed for criminal procedure. T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, GEO. IMMIGR. L.J. (forthcoming 2002) (manuscript at 2, on file with author).

²⁷⁰ *Zadvydas*, 121 S. Ct. at 2502 (“Nor do the cases before us require us to consider the political branches’ authority to control entry into the United States.”).

²⁷¹ As the Court noted:

The sole foreign policy consideration the Government mentions here is the concern lest the courts interfere with “sensitive” repatriation negotiations. But neither the Government nor the dissents explain how a habeas court’s efforts to determine the likelihood of repatriation, if handled with appropriate sensitivity, could make a significant difference in this respect.

Id. at 2502. As Justice Kennedy observed, in tellingly overheated characterization, the decision carries the “potential to undermine the obvious necessity that the Nation speak with one voice on immigration and foreign affairs matters,” and “goes far to undercut the position of the Executive in repatriation negotiations.” *Id.* at 2510, 2511 (Kennedy, J., dissenting). Kennedy raised as a specter the possibility that “[h]igh officials of the Department of State could be called on to testify as to the status of negotiations[,]” *id.* at 2517, as if such officials remain national avatars whose position puts them above the ordinary, sometimes disorderly process of government.

²⁷² *Id.* at 2504.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

were decided, they are best explained by that change. No longer does judicial intervention risk upsetting the sensitive balance of foreign relations. The international system is now sturdy enough to absorb the participation of the courts; indeed, the system has come, with disaggregation, to recognize them as independent players. The United States as an entity need no longer fear the global consequence of judicial missteps. On this score, again, September 11 need prove no impediment to the further erosion of plenary power, although obviously it could have retarding implications.²⁷⁶

Thus, each of these three examples of the foreign relations differential—relating to application of the political question doctrine, federalism, and individual rights—is explained and undermined by the global context and its transformation. Each was historically contingent on particular features of the old international system, one in which states confronted each other as such in a condition of near anarchy. The high stakes and serious instabilities of that system, combined with its recognition of exclusive state responsibility for the conduct of component elements, almost demanded that otherwise core constitutional values be suppressed. That is the only way to justify the development of these differentials; explanations for them are inevitably exogenous. But those justifications dissipate in the face of globalization. What once served as justification no longer persists, and the differential should be abandoned.

IV. GLOBALIZING THE WHOLE CONSTITUTION

But this is only a small part of the story. That globalization should ramify through the canon of foreign relations law does not take a great leap; after all, as described above, it should be rather obvious that change in the global context should have implications for that body of law the very definition of which implicates the global system. In this section, I tentatively sketch the more radical proposition that the tentacles of globalization will reach far beyond foreign relations law into the Constitution's core. The premise of an insulated Constitution may become contested. The same features of globalization that demand reexamination of the foreign relations differential may result in at least the partial subordination of the Constitution to international norms. In particular, the combination of disaggregation and economic globalization may enable the imposition of international norms on the United States. Such imposition would be undertaken by the decentralized instruments of global governance, and not through the channel of some global super-state.²⁷⁷ Nonetheless, federal constitutional law may come in the future to resemble the role of state constitutional law today—of significance, yes, but clearly of secondary importance in the broader norms system.

²⁷⁶ For an elaboration, see Peter J. Spiro, *Explaining the End of Plenary Power*, GEO. IMMIGR. L.J. (forthcoming 2002).

²⁷⁷ See, e.g., GUÉHENNO, *supra* note 2, at 49 (“[T]hose who expect of the twenty-first century the advent of the universal republic . . . are profoundly mistaken.”).

My purpose, and the task in confronting globalization's deeper reach, is different than in demonstrating its implications for foreign relations law. With respect to the latter, the normative equation was straightforward. The starting point of a differential implied the existence of an otherwise prevailing baseline, deviations from which require justification. Once the justification for such deviation disappears, return to the baseline itself requires no workout. The imposition of global norms on the United States, by contrast, represents change in the baseline itself. That poses a more daunting challenge, especially at the point where the parameters of those changes remain largely indeterminate. As noted above,²⁷⁸ I do not pretend here to prove that globalization is an inevitable condition. But there is now sufficient evidence of its ascendancy to merit a close investigation of its possible implications for the American constitutional construct.

In the face of that challenge, I offer two possible responses, one instrumental, the other normative. I first suggest that the possible imposition of international norms makes it important to focus on the new instruments of global governance by which those norms are devised and enforced. If, in fact, the United States proves unable to resist global norms, then the features of international norm-generation become critical, from both justice/accountability and national interests perspectives (to the extent that the latter remains a useful concept in the face of globalization). This argument serves as a rallying call for theorists to consider the peculiar difficulties of generating norms at the global level. It also takes aim at the New Sovereigntist school of scholars and policymakers who call for the United States to reject international norms and institutions.²⁷⁹

The second, more provisional, response attempts a justification for the submission of domestic constitutional values to global ones, or at least a non-materialist explanation for the development. This argument rests on the proposition that constitutions must coincide with communities. To the extent that the national community may be breaking down (even in the wake of September 11, which may prove less reinforcing of national identity than preliminary assessments would have predicted), the Constitution would break down with it. Nation-states are themselves a historically contingent unit of governance, ones that have been reified in the wake of centuries during which they did, by and large, coincide with actual community boundaries. There is evidence that community is increasingly coming to be defined in terms other than the state. If that shift proves sustainable, the state itself would become artifact, or at least be demoted from its longstanding position of institutional primacy. As those signs unfold, the sharp lines of the Constitution that have made it America's Constitution may begin to erode, and other structures will dictate to it.

²⁷⁸ See *supra* note 24 and accompanying text.

²⁷⁹ See *supra* note 16.

A. *Insinuating Globalization*

The old international order was one in which norms were largely segmented along state lines. In the face of weak transnational networks and the absence of supranational institutions, there were few mechanisms for the enforcement of norms. The use of force presented the basic tool for enforcing international law. Using force is costly to the enforcer (more so in that world than today, in the absence of institutionalized interstate relations), and that by itself might explain the traditional thinness of international law. States would only find it worth their while to use force when concrete interests justified it; those interests would likely only be present with respect to interstate relations.²⁸⁰ In that context, it is not surprising that a clear line prevailed between the international and the domestic, and that matters in the latter category were not contemplated by international law. Even if past generations had been inclined towards the international protection of human rights, for example, there would have been little institutional opportunity for such norms to have been enforced.

Globalization may provide those tools. In economic globalization, first of all, one finds a density of transnational interaction whose restriction can be brought to bear in norms enforcement. To the extent that global competitiveness is an important priority for states, states are vulnerable to international action that diminishes their competitiveness. We now thus see the increased deployment of economic sanctions and embargoes to the end of enforcing international norms.²⁸¹ But state-to-state economic action, even with the possibility of exploiting economic interdependence and the vulnerabilities it creates, standing alone remains a crude enforcement mechanism.²⁸² Sanctions are also costly to states that impose them, so much so that they are only realistically contemplated against states that are themselves economically inconsequential.²⁸³ That is why one sees state-to-state sanctions

²⁸⁰ To this extent, I would agree with Goldsmith and Posner's conception of international law as largely reflecting the rational behavior of states, *see* Goldsmith & Posner, *supra* note 16, but only as applied to the old world in which states were in fact discrete, insulated communities. It is telling that their case studies all involve old-world norms, including diplomatic immunity, the exemption of enemy property on neutral ship from wartime seizure, and rules regarding the territorial sea. *See id.* at 1139–67.

²⁸¹ *See, e.g.,* BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS 10–11 (1988) (noting increased use of sanctions since World War II).

²⁸² *See, e.g.,* *Hearings on Sanctions Reform: Hearings Before the Committee on Foreign Relations*, 106th Cong. 63 (1999) (statement of Undersecretary of State Stuart Eizenstat) (“[S]anctions are a blunt instrument. They are not a panacea nor are they cost free.”).

²⁸³ *See, e.g.,* CONGRESS OF THE UNITED STATES, CONGRESSIONAL BUDGET OFFICE, THE DOMESTIC COSTS OF SANCTIONS ON FOREIGN COMMERCE 28–34 (1999); ECONOMIC SANCTIONS AND AMERICAN DIPLOMACY (Richard Haas ed., 1999); Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 75–76 (2000); Robert A. Pape, *Why Economic Sanctions Do Not Work*, INT'L SECURITY, Fall 1997, at 106 (asserting that sanctions have a success rate of less than five percent).

imposed on such countries as Libya, Cuba, North Korea, and Serbia,²⁸⁴ and not on China or Saudi Arabia or, for that matter, the United States.

Here the disaggregation phenomenon comes critically into play. It is now structurally possible for international actors (including disaggregated actors from other states) to apply targeted economic and other forms of pressure on discrete actors within a state to advance compliance with international norms either by the state or components thereof. This kind of enforcement activity can take either of two basic forms. It can be applied directly against noncompliant components of states, or it can be applied against (in effect) bystander components that will in turn pressure noncompliant components or the noncompliant state itself into observing a particular norm. These targeted levers reduce the cost of enforcement action, so that it is possible to pursue enforcement against even the more powerful states.

Action against subnational authorities that violate international law would fall in the first category. Insofar as a country's noncompliance with international norms is in fact the result of noncompliance by territorial subdivisions acting within the sphere of their own authority, then the international community can act directly against those subdivisions.²⁸⁵ The same goes for non-territorial components such as corporations. If corporations are the ultimate target of a particular norm (as, for instance, is the case with labor rights norms), then compliance with the norm can be obtained through pressure applied directly against the corporations as such. In both cases, the enforcement action can be undertaken by non-state international actors.²⁸⁶ For instance, corporations might refuse to locate investment in a territorial subdivision that stands in noncompliance with international norms.²⁸⁷ International NGOs can marshal consumer pressure applied directly against noncompliant corporations.²⁸⁸ In

²⁸⁴ See 31 C.F.R. pt. 500 (2000) (designating Libya, Serbia and Montenegro, and North Korea as subject to asset control sanctions).

²⁸⁵ See *supra* notes 169–71 and accompanying text.

²⁸⁶ As Paul Wapner observes in an important contribution to the international relations literature on non-governmental organizations: "When [their] ideas have more resonance outside government, they will shift the standards of good conduct and persuade people to act differently even though governments are not requiring them to do so. . . . To the degree this sensibility sways people, it acts as a form of governance. Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics*, 47 *WORLD POLITICS* 311, 322, 336 (1995).

²⁸⁷ See *supra* note 171 (describing the prospect of diverted foreign investment from U.S. states applying the death penalty).

²⁸⁸ See generally Spiro, *supra* note 83 (describing extrainstitutional processes at the international level through which NGOs can advance an agenda without securing formal regulation). Perhaps the most prominent example of such action is found in the context of global labor standards on such issues as child labor and health and safety measures. In this context, human rights NGOs and major manufacturers have directly negotiated codes of conduct to govern such issues on a global basis. See, e.g., CHARLES SABEL ET AL., RATCHETING LABOR STANDARDS: REGULATION FOR CONTINUOUS IMPROVEMENT IN THE GLOBAL WORKPLACE 23 (Public Law Research Paper No. 01-21, Columbia Law School), available at http://ssrn.com/sol3/papers.cfm?abstract_id=253833 (last visited February 6, 2002) (describing Fair Labor Association and other

both cases, enforcement action is feasible as targeted, even if it would not be against the nation of which the territorial subdivision is a part or with which the corporation is identified. Alternatively, the pressure can be applied against a bystander component that will in turn act against an offending state or state component. Thus, the international community could act against a corporation or industry located in a particular state or a territorial subdivision by way of securing the subdivision's compliance with a particular norm.²⁸⁹ Or it could act against a subdivision with the objective of securing national action.²⁹⁰

In all cases, globalization affords the economic levers for such action. To the extent that all actors are a part of the global economy, they are vulnerable to any significant pressure that diminishes their competitiveness in it. Territorial subdivisions cannot afford to lose international investment or exports. Corporations cannot afford to lose international sales or investment. To the extent that the international community is willing to advance compliance with international norms at some cost,²⁹¹

private certification bodies); Steven Greenhouse, *Anti-Sweatshop Movement Is Gaining Ground Overseas*, N.Y. TIMES, Jan. 26, 2000, at A10. For other specific examples of such action, see Simon Birch, *Peace in the Spirit Bear's Homeland: The Logger's Chainsaw Has Been Turned Back by an Unusual Deal in British Columbia*, FIN. TIMES, May 12, 2001, at 3 (noting an international boycott against a company that planned to log rainforests in British Columbia that were habitat to a rare species of bear); Lucette Lagnado, *Gerber Baby Food, Grilled by Greenpeace, Plans Swift Overhaul*, WALL ST. J., July 30, 1999, at A1 (describing how the threat of Greenpeace protests forced a baby food producer to stop using genetically altered product ingredients); Michael Parrish, *Pact May Stop Dolphin Deaths in Tuna Fishing*, L.A. TIMES, June 17, 1992, at A1 (noting that makers of Star-Kist, Chicken of the Sea, and Bumble Bee all acceded, prior to the implementation of federal legislation, to activist demands to stop harvesting tuna products without using dolphin protection measures).

²⁸⁹ The threatened retaliation of Great Britain against corporations headquartered in California in the face of the state's tax computation method presents one example. See *supra* note 170. A more prominent developing example is presented by a campaign recently launched against U.S. oil companies on the grounds of the U.S. failure to accede to the Kyoto Protocol on global warming. Although the oil companies may not be bystanders in the sense of a complete lack of involvement in the underlying issue—insofar as their activity involves atmospheric emissions, and insofar as they have sought to advance an anti-Kyoto agenda through campaign contributions—the purpose of the campaign is not to change their conduct, but rather to have them pressure the U.S. government into changing its stance on the issue. See, e.g., Vanessa Houlder, *Greenpeace Threatens U.S. Oil Groups*, FIN. TIMES, April 27, 2001, at 8 (discussing Greenpeace's threat to boycott U.S. oil companies unless the United States adopts the Kyoto agreement). As one observer describes the strategy, activists “start with consumers at the pump, get them to pressure the gas stations, get the station owners to pressure the companies and the companies to pressure the government.” Thomas L. Friedman, *A Tiger by the Tail*, N.Y. TIMES, June 1, 2001, at A19.

²⁹⁰ See *infra* note 302 (discussing examples).

²⁹¹ Surveys have shown that consumers are willing to pay more for products that are certified as having been produced in conformity with certain conditions. For instance, more than 75% of consumers in one poll said that they would spend \$25 for a piece of clothing certified as not having been produced in a sweatshop rather than \$20 for the same product that was not certified. See

disaggregation allows them to do so at a small one.

The United States will hardly be immune to these possibilities, afforded by globalization, for the enforcement of international law. The authority of U.S. states implicates a variety of human rights norms in such areas as criminal justice and family law;²⁹² state-level action may even come up against emerging international standards in such areas as tax law,²⁹³ trade law,²⁹⁴ and judicial procedure.²⁹⁵ Where a U.S. state is noncompliant with any such norm, globalization allows for the direct discipline of that state in the form of relocated international investment and purchasing decisions, on the part of both international state and non-state actors. There are examples of such targeted action, and one would expect to see more as international norms in these and other areas further harden.²⁹⁶ The same observation could be made with respect to the compliance of U.S. corporations with international norms, most notably human rights and environmental norms. Any corporation with an identifiable product or service (which includes most concerns other than those dealing in fungible natural resources) is vulnerable to international consumer action, including consumption by other corporations. In both cases, relatively substitutable alternatives will exist. An international actor can move its money to another territorial subdivision or from one corporation to another with a similar product. To the extent that international actors may themselves be subject to pressures from their own constituencies (voters, shareholders, consumers), the cost of shifting to the substitute will often be smaller than that of continuing to deal with the offender.

By way of example, consider the emerging norm against the execution of juvenile offenders, a practice that is now, for the most part, only undertaken in some U.S. states (Texas most notably among them).²⁹⁷ Where international actors would find it costly to try to enforce this norm against the United States as a whole (the only option available before globalization), such action is practical as leveled against a few

Gereffi et al., *supra* note 83, at 59.

²⁹² See Spiro, *supra* note 14, at 1224–25 (describing U.S. failure to ratify Convention on the Rights of the Child as grounded in federalism concerns).

²⁹³ See, e.g., HOCKING, *supra* note 71, at 130–34 (describing how the unitary tax method used by states to compute corporate profits emerged as an issue of international concern in the *Barclays Bank* controversy).

²⁹⁴ The Massachusetts law at issue in the *Crosby* case, for example, was challenged by the European Union and Japan as inconsistent with the WTO Agreement on Procurement. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000); see also EUROPEAN COMM'N, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT § 4.6, at 32 (1999) (expressing “strong object[ion]” to state and local selective purchasing laws).

²⁹⁵ See, e.g., Spencer Weber Waller, *A Unified Theory of Transnational Procedure*, 26 CORNELL INT'L L.J. 101, 120–21 (1993) (describing how state procedural rules implicate foreign relations).

²⁹⁶ See *supra* notes 169–71 and accompanying text.

²⁹⁷ See, e.g., Sara Rimer & Raymond Bonner, *Whether to Kill Those Who Killed as Youths*, N.Y. TIMES, Aug. 22, 2000, at A1 (reporting that the United States has executed more juvenile offenders over the last decade than all other countries combined).

states. Corporations, most significantly, may increasingly fear bottom-line losses from investing in those states that use capital punishment expansively, at the same time that other states will present alternatives. Consumers may launch product or tourism/convention boycotts.²⁹⁸ How many lost auto plants and tourist dollars would it take for a state such as Texas to change its use of capital punishment? The institutional logic here seems inescapable, and application of the mechanism inevitable.²⁹⁹ The end result will be, in effect, a constitutional norm against juvenile executions, the Supreme Court's Eighth Amendment jurisprudence notwithstanding.³⁰⁰ Conduct that would otherwise be permissible as a matter of domestic law will be delegitimized through international mechanisms.

This logic works against disaggregated component units outside of central governments. It is not so clearly applied against central governments, disaggregated as they may be.³⁰¹ But globalization may also effectively discipline central government actors, along two possible paths. The first would use disaggregated bystanders to exert pressure against the central government as a whole. Thus, international actors could squeeze a corporation or a territorial subdivision that themselves are innocent of any non-compliance, but who could be expected to exert compliance pressure in turn on a central government.³⁰² This is emerging as a clear strategy in the new world trade regime; in the wake of findings of GATT-illegality, injured states will construct sanctions packages in part with an eye to producing maximum political pressure by

²⁹⁸ See Spiro, *supra* note 83.

²⁹⁹ Of course, there is the probability of overdetermination here, as other factors evidently also point to abandonment of the death penalty. See, e.g., Alan Berlow, *The Broken Machinery of Death*, AM. PROSPECT, July 30, 2001, at 16. Whatever the scenario, however, it will at this point be difficult to claim that international factors played no role in its abandonment.

³⁰⁰ *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (finding that the execution of a person who committed a crime at the age of seventeen did not constitute cruel and unusual punishment).

³⁰¹ See Slaughter, *supra* note 69 (discussing the disaggregation of national executives).

³⁰² In one recent example of the use of this mechanism, an international boycott effort was undertaken against Beaujolais wine by way of pressuring France into halting nuclear weapons tests in the South Pacific. Here, the industry targeted was itself innocent of any misconduct (thus, in this model, qualifying as a "bystander"), but the loss of sales resulting from the boycott sufficed to secure the desired change in state conduct. See *Protest Hurts Wine's Sales*, N.Y. TIMES, Dec. 25, 1995, at 58 (reporting an 18% drop in Beaujolais sales, attributed to the anti-nuclear protest). Measures directed against companies doing business in human-rights abusing countries can also be located in this category, although the corporations targeted are in that case not characterized as simple bystanders. In those cases, the immediate aim is to secure the corporation's withdrawal from a particular country, but the ultimate aim is to change the practices of the country itself. Efforts against the repressive government in Burma present the most prominent recent example. See, e.g., Ted Bardacke, *Western Companies Encounter Protesters on the Road to Burma: After Heineken Campaign Dutch Activists Will Target French Group*, FIN. TIMES, July 12, 1996, at 3 (describing the withdrawal of corporations from Burma in the face of shareholder and consumer criticism).

affected corporations against their home-country governments.³⁰³

Second, and more intriguing, globalization may present opportunities for direct, non-economic action against the component parts of central governments. Pre-globalization, component parts of central governments had little contact with international actors, for in the aggregated state such contact was channeled through a single institutional channel. Today, by contrast, virtually every element of the federal government has independent channels of communication with the international community. Almost every federal agency now has an international section, sometimes quite substantial, undertaking its own international contacts; many place their own officials in U.S. diplomatic facilities, only nominally under the direction of the Secretary of State.³⁰⁴ Congress undertakes a variety of such contacts, both in Washington and abroad.³⁰⁵ Finally, even the federal judiciary has expanded enormously its contacts with foreign entities. There is emerging, first of all, a thick web of interjudicial contacts, both informal³⁰⁶ and institutionalized.³⁰⁷ U.S. courts increasingly find international entities, including foreign governments and international NGOs, before them not only as parties, but also as amici.³⁰⁸ Cases that

³⁰³ See Helene Cooper, *Why Does U.S. Pick on Pecorino in Flap with EU on Bananas?*, WALL ST. J., Mar. 1, 1999, at A1 (discussing U.S. tariff sanctions on European products); see also William Roberts, *US Strategy in Banana Tiff: Divide and Conquer*, J. COM., Dec. 9, 1998, at A1 (describing a strategy of distinguishing among EU member states for purposes of sanctions by "rewarding the 'good boys' and punishing the 'bad boys' with threats" of sanctions).

³⁰⁴ See, e.g., Howard J. Wiarda, *Beyond the Pale: The Bureaucratic Politics of United States Policy in Mexico*, 162 WORLD AFF. 174, 176 (2000) (reporting that more than thirty U.S. government agencies are represented among personnel in the U.S. embassy in Mexico); see also Robert O. Keohane & Joseph S. Nye, *Realism and Complex Interdependence*, in THE GLOBALIZATION READER 77, 78 (Frank J. Lechner & John Boli eds., 2000) (noting that many foreign policy issues are now being considered outside of foreign offices).

³⁰⁵ See, e.g., Barbara Crossette & Eric Schmitt, *U.N. Ambassadors in Helms Land: Smiles On, Gloves Off*, N.Y. TIMES, Mar. 31, 2000, at A8 (describing a meeting between Senate Foreign Relations Chairman Jesse Helms and fourteen U.N. ambassadors); Clyde Farnsworth, *Congress Move on Cuba Irks Canada and Mexico*, N.Y. TIMES, May 23, 1995, at A3 (describing direct lobbying by foreign governments); Elaine Sciolino, *New Protocol: Heads of State Now Court Congress*, N.Y. TIMES, Apr. 8, 1995, at A3 (commenting on the recent trend of the heads of foreign governments lobbying members of Congress).

³⁰⁶ See, e.g., Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 26 (1998) (Canadian Supreme Court justice describing growing personal contacts among members of the judiciary from different countries, including through e-mail).

³⁰⁷ See generally Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1120-23 (2000) (describing contexts in which U.S. judges are interacting with foreign counterparts). In 1995, Chief Justice Rehnquist and the U.S. Judicial Conference created a "Committee on International Judicial Relations" to coordinate contacts with foreign judiciaries and others. See Michael H. Mihm, *International Judicial Relations Committee Promotes Communication, Coordination*, INT'L JUD. OBSERVER, Sept. 1995, at 1.

³⁰⁸ See *supra* notes 130-32 and accompanying text.

have attracted such foreign participation include constitutional and foreign relations law cases. Indeed, in the foreign relations law category such participation is becoming routine.

This form of disaggregation does not appear to allow for the same mechanisms of norms enforcement as does the disaggregation of non-central government actors, insofar as central government components are not amenable to economic competition. One cannot, for the most part, threaten to take one's business elsewhere when it comes to national courts, legislatures, or executive agencies. However, there may be other mechanisms for the international community to hold central government components directly responsible for their actions. Central government components will, for starters, inevitably become more comfortable with international law as they develop institutional ties with their foreign and international counterparts.³⁰⁹ But here I would also tentatively suggest that there may be some forms of international "shaming" that can be deployed in the face of disaggregation. This form of discipline could range from seemingly trivial comments at conferences and cocktail parties to more formal statements of condemnation from international counterparts and umbrella associations. Justices of the U.S. Supreme Court, now constantly on the foreign junket circuit,³¹⁰ get an earful regarding various U.S. norms that are out of step with international law.³¹¹ That certainly makes them aware of possible ways in which U.S. practices are inconsistent with international ones; at some point the level of discomfort presented by such criticism might at least marginally affect decision-making. To the extent that rejection of international law by the American judiciary comes to compromise its legitimacy, it will assimilate international law sources.³¹² I would not want to overestimate the significance of this possible mechanism for enforcing international norms, but I suspect that there may be something to it. If there is, then of course similar shaming exercises against other component actors

³⁰⁹ Thus it may not long be fair to say that "[i]nternational law is a mystery to most U.S. judges," Bradley & Goldsmith, *Critique*, *supra* note 16, at 874–75, though it would also help matters to assimilate more international and foreign relations law into the U.S. law school curriculum. See Flaherty, *supra* note 10 (calling for inclusion of international law materials in the basic constitutional law course).

³¹⁰ For one report, see Stephen Breyer, *Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045 (2000) (reporting observations from a two-week European tour by four U.S. Supreme Court justices); see also Joan Biskupic, *From Moscow to Missoula, Justices' Jaunts Span the Globe*, WASH. POST, Aug. 5, 1996, at A17 (reporting on off-term travel by Supreme Court Justices).

³¹¹ See, e.g., L'Heureux-Dubé, *supra* note 306, at 37 (Canadian jurist criticizing Rehnquist court for failing to account sufficiently for international norms); Shapiro, *supra* note 171, at 14 (describing possible impact on U.S. judges in death penalty context of their "spending more and more time at international conferences").

³¹² See Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 422–24 (2000) (arguing that the Supreme Court will turn to international law sources for the same reasons that it took account of social science data in such cases as *Muller v. Oregon* and *Brown v. Board of Education*).

(subnational authorities³¹³ and corporations³¹⁴) would add a tool to those supplied by economic globalization.

But the theory does not depend on this last piece in order to work. The coupling of economic globalization and disaggregation could suffice to drive the enforcement of international norms against the United States. The result is a global contextualization of all constitutional law, or at least that portion of it that implicates international norms.³¹⁵ This last qualifier is of course an important one, for the scope of hard international norms on matters otherwise within the purview of “domestic” constitutional law is still relatively narrow. But the groundwork for a broader spectrum of such norms is in place; one need only glance at the International Covenant on Civil and Political Rights³¹⁶ to understand the potential swath that international law will cut.³¹⁷ Some such aspirational norms are already satisfied by existing U.S. practice, so that no modification would necessarily be required even as the norms do harden.³¹⁸ But even with respect to those practices, there will be (as with

³¹³ See Spiro, *supra* note 171, at 586 & n.72.

³¹⁴ See David A. Skeel, *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001).

³¹⁵ Judith Resnik appears to be among the few constitutional theorists who sees this conclusion, though through a different lens. See Resnik, *supra* note 7, at 621–22. As she observes:

And just as it cloaks the exercise of national powers from view, categorical federalism also provides a false sense of security from transnational lawmaking. United States laws of all kinds are increasingly altered, if not trumped, by practices stemming from quarters physically distant from Washington but not far in forms of space that globalization has come to represent. The United States government needs to develop means of interacting with these laws rather than to assume an ability to remain insular. In the twenty-first century, believing one can mandate the boundaries is seductive but wrong

Id.; cf. Hamilton, *supra* note 7, at 311 (“The late twentieth century’s New World is a puzzle map of old worlds wherein the larger puzzle is decidedly more than the sum of its parts. We are undergoing a revolution in context.”).

³¹⁶ *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (opened for signature Dec. 19, 1966, entered into force Mar. 23, 1976), S. Exec. Doc. E, 95-2, at 1 (1978) [hereinafter ICCPR].

³¹⁷ The ICCPR includes provisions relating, for instance, to the terms of arrest and detention, see *id.* art. 9 (providing that a person arrested be promptly informed of charges against him, and be “entitled to trial within a reasonable time or to release,” as well as to an enforceable right to compensation in the event of unlawful arrest or detention); to the right to freedom of “thought, conscience, and religion,” *id.* art. 18; to the right “to vote and to be elected at genuine periodic elections,” *id.* art. 25; and to the prohibition of discrimination on such grounds as race, sex, language, “social origin . . . birth or other status.” *Id.* art. 26. New Sovereignist scholarship has highlighted the broad scope of contemporary international human rights, to the point of cartooning it. See, e.g., Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 CHI. J. INT’L L. 327, 332 (2000) (suggesting that the ICCPR could be interpreted to prohibit discrimination on the basis of beauty, weight, or intelligence).

³¹⁸ As it should go without saying, the United States is largely compliant with human rights norms, as even its most ardent critics will concede. See, e.g., Kenneth Roth, *The Charade of US*

the U.S. Constitution) an interpretive refinement and evolution of the international standards; current compliance does not guarantee compliance in the future.³¹⁹ In short, the substantive areas in which international law will govern U.S. law will likely expand.

B: *The Constitutional Endgame*

Considered instrumentally, this imposition of international norms will mostly prove rights enhancing. Insofar as international law affords lesser protection than does U.S. law, the domestic norms will in some cases present a floor, in the way of state constitutional protections exceeding those granted under the federal constitution. There will be other cases in which the equation will not be so simple, however, as where one set of rights is balanced against another. Hate speech presents an emerging example. Hate speech is banned by the ICCPR³²⁰ at the same time as the Supreme Court has found it protected under the First Amendment.³²¹ International family law norms will also tend to pit the rights of one group against those of another. The point is that international law is not just about improving human rights. There is some cause for concern regarding the content of international norms.³²² There is also cause for concern regarding the process by which international law is made. As the New

Ratification of International Human Rights Treaties, 1 CHI. J. INT'L L. 347, 351 (2000) ("The United States certainly has much to boast about when it comes to human rights.").

³¹⁹ By way of attempting to avoid any such eventuality, the United States has conditioned its accession to various human rights accords by pegging the extent of its acceptance to parallel provisions of domestic constitutional law. For instance, in acceding to the Torture Convention, the United States deemed that it "considers itself bound . . . under [the Convention's] Article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as [that] term . . . means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." U.S. Senate Resolution of Advice and Consent to the Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. 36,198 (1990). Of course it is the thesis of this article that any such attempts will fail, in the long run, to block the imposition of norms differing from those found in the domestic Constitution.

³²⁰ ICCPR art. 20(2) ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."). In acceding to the ICCPR, the United States reserved from this provision. See U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 CONG. REC. 8070 (1992). Had the Senate not so qualified the terms of U.S. participation in the ICCPR regime, the Supreme Court well might have. See *Reid v. Covert*, 354 U.S. 1 (1957) (holding that treaty cannot trump individual rights protected under the Constitution).

³²¹ See *R.A.V. v. St. Paul*, 505 U.S. 377, 393 (1992) (striking down on First Amendment grounds a municipal ordinance that prohibited the display of a symbol intended to arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender").

³²² See, e.g., Resnik, *supra* note 7, at 676 ("[N]either transnational lawmaking nor globalism is necessarily an engine of equality.").

Sovereignists are apt to highlight from a largely conservative starting point,³²³ and anti-globalists from a progressive one,³²⁴ there are serious accountability problems in international decision-making institutions, as well as with setting of standards outside of such institutions.³²⁵ So the fact that the international community now enjoys the power to impose norms on the United States is not necessarily cause for celebration.

But a response founded on an opt-out capacity is a vulnerable one. That response is inconsistent with the nature of globalization; globalization, if perfected, will preclude the possibility of opting out.³²⁶ Non-participation by the United States in international regime-building will not exempt it from the product of such standards-setting processes. The refusal to join such regimes could, from a U.S. perspective, only compound the process problem, and the content problem in turn. The United States might better accept the fact of globalization's power, and work to grapple with the process and content problems of international law. The accountability gap in international norms formulation can be overcome, but to take account of U.S. interests the United States must accept the legitimacy of related institutions and of the results of international lawmaking processes. To work from Hirschman's equation,³²⁷ there is no exit here, but the United States can amplify its voice if it signs on to the international lawmaking institutions. If there is an instrumentalist message to take away from this description of globalization's constraint, it can be reduced to "better join than fight"; the persistent U.S. refusal to accede to international institutions will in the long run hurt none other than itself.

But that response does not set to rest the legitimacy objection (also voiced by

³²³ See, e.g., JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 64 (1998) (decrying the infiltration of international law as formulated by "people who like people who clink glasses at international gatherings—perfectly nice people, perhaps, but not having any real accountability in the American constitutional scheme"); Bradley & Goldsmith, *Conditional Consent*, *supra* note 16, at 458 (highlighting "nondemocratic and nontransparent ways in which much international law is made"); John C. Yoo, *UN Wars, US War Powers*, 1 CHI. J. INT'L L. 355, 361 (2000) ("Novel forms of international cooperation increasingly call for the transfer of rulemaking authority to international organizations that lack American openness and accountability.").

³²⁴ See, e.g., *Lori's War*, FOREIGN POL'Y, Spring 2000, at 37 (quoting Lori Wallach, director of Public Citizen's Global Trade Watch, "[b]etween someone who actually got elected, and the director general of the WTO, there are so many miles that, in fact, he and his staff are accountable to no one").

³²⁵ See also, e.g., Martha C. Nussbaum, *In Defense of Universal Values*, 36 IDAHO L. REV. 379, 395 (2000) ("[T]he relationship between a system of international law to the various national states . . . raises complex issues of accountability, and even strong universalists about rights may legitimately worry about the democratic credentials of international human rights bodies, when they seek to enforce norms against democratically accountable nation states.").

³²⁶ As Guéhenno observes, "[t]he nostalgic citizens of the declining Roman republic appealed, not without grandeur, to the virtue of ancient times. Our lamentations today will not stop the march toward a new empire, any more than did theirs." GUÉHENNO, *supra* note 2, at xii.

³²⁷ See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

New Sovereignists and anti-globalization activists alike): why should we submit to international norms? Why not fight the imposition of norms that are not *our* norms? The "better join than fight" response does not address questions of legitimacy.³²⁸ Indeed, one might detect a whiff of collaborationism in the call to accept international legal standards on the grounds that the international community now has the power to impose them.

The possible response to this objection goes to foundational dynamics between identity and constitutional governance. I have thus far dichotomized the American and international communities, working from an implicit premise that there is an "us" and a "them" that are divided by the water's edge. If that premise held, then there would be a legitimacy problem that no single seat at the table could cure. If the international community represented an alien quantity, in other words, the sop of American representation in international institutions would not validate the imposition of norms on the United States regarding the way the national government constitutes itself for the purpose of governing Americans.

That, of course, may explain the old world in which such matters were, under the international law doctrine of sovereignty, left to the discretion of individual states. But that is not today's world. The dichotomization of "us" and "them" along national lines no longer reflects the real world; there are now many other definitions of "we" that cut across national lines.³²⁹ Global identity systems have become unstable. Various "international" actors and communities include many Americans. Various "domestic" actors and communities—the component units that have been disaggregated by globalization—now include non-U.S. entities. "American" corporations and non-governmental organizations, most obviously, will often include significant non-U.S. elements, including non-U.S. subsidiaries, employees, and shareholders (in the case of corporations),³³⁰ and non-U.S. members (in the case of NGOs). For some purposes, the states and even the "national" community include aliens.³³¹ By the same token "foreign" corporations, NGOs and territorial jurisdictions

³²⁸ As Robert Post asks, in reference to the human rights law as applied by the new International Court of Criminal Justice: "[W]ho makes this law? Whose identity does it represent? Who sets its goals? . . . Stripped of the historically-specific institutional procedures and legal traditions of particular nation-states, what authority does naked law hold?" Post, *supra* note 7, at 329.

³²⁹ Thomas M. Franck, *Community Based on Autonomy*, 36 COLUM. J. TRANSNAT'L L. 41 (1997); Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597 (1999) (reviewing ROGER SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997)).

³³⁰ See, e.g., ALBROW, *supra* note 3, at 131 ("[T]he strategies of multinational enterprises with diffuse ownership and location often make clear-cut attribution of nationality impossible."); Thomas L. Friedman, *Foreign Policy 3.1*, N.Y. TIMES, Oct. 8, 1995, § 4, at 13 ("We like to think we are a company based in America that is a global company. In every country we are Microsoft. Not American. Microsoft.") (quoting Steve Ballmer of Microsoft).

³³¹ Aliens are, for instance, included in the national census for legislative apportionment and other purposes. See, e.g., *Fed'n for Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp.

will include Americans in these various capacities.

This seems more profound a change than what one would take from the already clichéd observation that globalization has blurred the lines between the domestic and international. It is not just a blurring, but a restructuring. The result is a global order in which communities of transnational definition will have an interest in many elements of the way that nation-states exercise their powers. If one accepts that as a premise, then the setting of relevant norms at the international level follows as a matter of course. Norms segmentation is appropriate with respect to segmented communities, as nations used mostly to be relative to one another.³³² But once communities start significantly to overlap, norm formulation will naturally and legitimately migrate to the level that encompasses them all, in which each can participate.³³³ Even were the New Sovereigntist position sustainable as a practical matter in the face of globalization, it would suffer a legitimacy deficit to the extent that national institutions persisted in seeking independently to regulate matters of interest to transnational communities. It may be that globalization results in the obsolescence of the United States as a constitutional organizing principle.³³⁴

Although I have no pretense of expertise on the history of federalism in the United States, some parallels seem apparent. At one time, the primary locus of community was found at the state level, and it was at that level that most norms were set. As the various types of community crossed state lines, however, the locus of

564 (D.D.C. 1980) (rejecting challenge to the inclusion of undocumented aliens in the 1980 census count on standing grounds).

³³² This is consistent with Friedrich's definition of community as "the thing *within* which political events occur . . . [and] the thing *upon* which all the political goings-on depend." Carl J. Friedrich, *The Concept of Community in the History of Political and Legal Philosophy*, in COMMUNITY 3, 23 (Carl J. Friedrich ed., 1959). That used to be more or less true of national communities, but clearly no longer remains sustainable in the face of globalization.

³³³ On this point I would question Frank Michelman's assertion that to the extent that globalization displaced domestic law, "the law that people would regularly confront would increasingly be law with whose creation they have had nothing whatsoever to do." Michelman, *supra* note 7, at 1071. Michelman's mistake is to suppose that globalization would replace domestic regulatory regimes with "only general background law from the *ius gentium* (or whatever) to occupy those fields." *Id.* at 1082. On the contrary, the law that comes with globalization has the promise of equal refinement and legitimacy, as much the product of peoples as domestic law has been. International law (if it is to be accepted as legitimate) will be made through the participation of various communities, composed, of course, of individuals. Those communities have in the past been mostly of national definition; today, other communities, of other definition, are also participating in the process. Although international lawmaking is in this sense corporatist, individuals nonetheless are, through their group memberships, participants in the process.

³³⁴ As conceded, for instance, even by a liberal nationalist such as political scientist Rogers Smith. See ROGERS SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 506 (1997) ("Americans should in fact accept that a time may come when the United States itself, like preceding human political creations, is less rather than more useful as a way of constituting a political community that can engage people's loyalties and serve their finest aspirations.").

governance shifted to the national level. The mechanisms by which norms were imposed on the states differ from those imposed with the tools of globalization; the sorts of competitive pressures permitted in the face of capital mobility and dense trading networks were not available for disciplinary purposes, and so a formal command structure (backed by force of arms) was required. But the explanations for the migration of norm formulation may share characteristics, in both cases corresponding with changed definitions of community.

To the extent that it holds, the analogy is also useful in terms of suggesting the plausibility of the significant norm formulation at the international level. Surely the eventual extent of federal regulation in the U.S. context was beyond the imagination of the Founding generation,³³⁵ in perhaps the same way that it is today beyond the imagination of many Americans that the Constitution could be subordinated to international regimes. One cannot dismiss out of hand the possibility of a globalized Constitution, and constitutional theorists might start thinking about what has been the unthinkable. I have hardly offered a proof here. But I hope this plausible sketch supports a higher sensitivity to global dynamics in evolving constitutional theory.

IV. CONCLUSION

Those elements of American law that implicate the international have always been informed by international institutional design. Thus, one can explain the peculiar rules of foreign relations law by reference to the international context in which they emerged. The reorientation of constitutional values in foreign relations law—including the refusal of courts to review cases in the area, the ouster of the state authority, and the diminishment of individual rights—can all be pegged to a world composed only of nations in hostile competition with each other. Indeed, that world demanded a foreign relations differential, for in its dealings with the outside world the United States faced threats of the gravest kind, ones against which all other constitutional norms had to be submerged. But that world is no more. With the advent

³³⁵ As Jack Rakove writes of America in the 1780s: "For most Americans . . . national politics mattered little. . . . When Americans thought about politics at all, they directed their concerns toward local and state issues." JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 28–29 (1996). The same can be said today of international institutions, to which Americans devote little attention. Jessica Mathews observes:

After three and a half centuries, it takes a big mental leap to think of world politics in any terms other than that of occasionally cooperating but usually competing states, each defined by its territory and representing all the people therein. Nor is it easy to imagine political entities that could compete with the emotional attachment of a shared landscape, national history, language, flag and currency.

Mathews, *supra* note 28, at 12. And yet national history demonstrates that such contemporary focus may not evidence longer-term consequence; perhaps others in future generations will closely study today's deliberations in such institutions as the World Trade Organization even if we do not.

of globalization, as defined by the democratic peace, the disaggregation of nation-states, and the intensification of global economic competition, the foundations of the foreign relations differential have been swept away. No longer can one justify these departures from otherwise prevailing constitutional baselines. Globalization will result in the abandonment of the foreign relations differential.

And it may dig deeper into our constitutional system. The very features of globalization that make the world a less threatening place will also render the United States more vulnerable to the imposition of international norms. As the international system unpacks the nation-state and confronts its components, no country—not even the supposed sole superpower—can resist or insulate itself from global forces. As community boundaries diverge from national ones, law making may migrate from national institutions toward global ones. The legal academy should anticipate that possibility and confront its many challenges.